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CALIFORNIA JURISPRUDENCE

A COMPLETE STATEMENT OF THE LAW AND PRACTICE OF THE STATE OF CALIFORNIA

Editor

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Editor Ruling Case Law,
Federal Statutes Annotated, Annotated Cases,
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VOLUME IX

DEDICATION TO EJECTMENT

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CALIFORNIA JURISPRUDENCE

VOLUME IX

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I. INTRODUCTORY.

§ 1. Definition and Nature.—Dedication is the voluntary setting apart or devotion of land, or of an interest in it, by the owner to the use of the public.[1] It commonly implies an appropriation to public use without compensation, in other words, a donation, and "considering a dedication as a voluntary transfer of an interest in land, it partakes both of the nature of a grant and of a gift; and is governed by the fundamental principles which control such transactions."[2] But the term has recently been used in connection with a conveyance to a county, made for a valuable consideration.[3] The word "dedication" is, in fact, loosely employed, and not every use of it falls within the accepted legal definition.[4] The word "abandonment" is also used in California in a sense practically identical with that of an implied dedication;[5] for whether the land is set apart, devoted, appropriated or surrendered or abandoned to public use, the effect is the same.

1. People v. Myring, 144 Cal. 351, 77 Pac. 975; People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203; People v. Dreher, 101 Cal. 271, 35 Pac. 867; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Hartley v. Vermillion, 7 Cal. Unrep. 15, 70 Pac. 273; Spaulding v. Wesson, 5 Cal. Unrep. 399, 45 Pac. 807; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

2. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688. See Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961 (saying that an offer to dedicate is a proposal to donate.) And see Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839 (saying that the dedication of a park by a subdivider of land enhances the value of private property fronting upon it, and the owner is presumed to have received compensation for its surrender in the increased price of abutting property).

3. Humboldt County v. Van Duzer, 32 Cal. App. Dec. 924, 192 Pac. 192.

4. See Shultz v. Redondo Improvement Co., 156 Cal. 439, 105 Pac. 118 (where the word "dedication" is used in connection with the proposed creation of a private way).

5. Pol. Code, § 2618; Plummer v. Sheldon, 94 Cal. 533, 29 Pac. 947; Patterson v. Munyon, 93 Cal. 128, 29 Pac. 250; Babcock v. Welsh, 71 Cal. 400, 12 Pac. 337; San Francisco v. Scott, 4 Cal. 114; Rice v. Boyd, 2 Cal. Unrep. 196. As to abandonment in general, see ABANDONMENT, vol. 1, p. 1.

Dedications may be created by estoppel,[6] in some instances, and have been said to be but a phase of that doctrine.[7] "A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large."[8]

§ 2. Scope of Article.—The present article deals with dedication, the parties to it, the subject matter, the mode of its accomplishment, its revocation, and its operation and effect. It covers all the purposes for which landed property is thus transferred to the public for public use. But it necessarily excludes the acquisition of land by private corporations or other agencies operating public utilities, whether by grant or otherwise,[9] and also property acquired by the state or a municipality in a merely proprietary capacity, unimpressed by a special public use.[10] The taking of property under proceedings in eminent domain, being, as far as the owner is concerned, a forced and not a voluntary transfer, is dealt with under its appropriate heading,[11] as is also the acquisition of private easements, whether by grant or prescription.[12] The dedication of waters, water sources, and irrigating and distributing systems, which is involved with the intricate and, in a semi-arid country, highly important, subject of the control of water as a public utility, is considered in connection with the general discussion of waters.[13] So, likewise, the dedication of bridges is separately dealt with.[14]

6. See infra, § 13.

7. Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178.

8. Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591. See infra, § 28, as to sale of lots by recorded map operating as dedication by estoppel. See infra, § 49, as to estoppel preventing revocation.

9. See ELECTRICITY; GAS; OIL; RAILROADS; STREET RAILROADS; TELEGRAPHS AND TELEPHONES.

10. See COUNTIES; MUNICIPAL CORPORATIONS; STATE OF CALIFORNIA.

11. See EMINENT DOMAIN.

12. See ADVERSE POSSESSION, vol. 1, p. 592; EASEMENTS; PRIVATE WAYS.

13. See WATERS.

14. See BRIDGES, vol. 4, pp. 515, 516.

And, lastly, the control, regulation, improvement and abandonment of highways, wharves, parks, and other public properties, even though dedicated, as well as their establishment by statutory mehods, otherwise than by dedication, are discussed under their appropriate titles.[15]

§ 3. Survey of California Law.—The law of dedication has oddly escaped the almost universal sweep of codification which has characterized the jurisprudence of California. Its principles are those of the common law, enunciated and applied by the courts without statutory interference, though modified to some extent by the circumstances of climate and topography, and the exigencies of a pioneer community.[16] Dedication as a method by which the public may acquire a highway is, however, recognized in the Political Code,[17] while one lone provision in the Code of Civil Procedure, which seems to have escaped judicial comment, declares a disputable presumption that land used as a public cemetery for five years with the owner's consent, has been dedicated to public use.[18] The law requiring the filing for record of a plat of a subdivision before lots are sold recognizes dedications made in this manner.[19] At various times, also, local statutes, and at one time a section of the Political Code,[20] have declared that public use of a road for five years should constitute it a public highway, and this legislation has had an important bearing on the question of implied dedication.[1]

15. See HIGHWAYS; PARKS AND SQUARES; SCHOOLS; WHARVES.

16. Harding v. Jasper, 14 Cal. 642 (saying that as to the quantum and kind of evidence necessary to show an intent to dedicate, "the peculiar circumstances of the country must be taken into account"). See also People v. Rindge, 174 Cal. 743, 164 Pac. 633, for an interesting account of primitive conditions of travel in California.

17. Pol. Code, §§ 2618, 2621.

18. Code Civ. Proc., § 1963, subd. 38. See CEMETERIES, vol. 4, p. 996.

19. Act 2065, Gen. Laws 1915, p. 809, as amended, Supp. 1919, p. 1376.

20. Pol. Code, § 2619 (as it existed in 1872–74).

1. See infra, §§ 32–40.

II. PARTIES AND SUBJECT MATTER.

§ 4. Parties in General.—In a strictly legal sense, dedication is a matter purely between the owner of land and the public. There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication.[2] But no other parties are essential. While there can be no dedication without the participation of both the owner and the public, no dedication can be made stronger or more binding by the intervention of others.[3] It is not essential to the validity of a dedication that there should be any grantee of the use or easement in esse to take the fee, such cases being exceptions to the general rule requiring a grantee in all transfers of land.[4]

§ 5. Who may Dedicate.—As a mode of transfer, dedication is as effectual as a grant; and the owner of land has the same right to dedicate it to public use that he has to transfer it to a private individual by grant.[5] By the same reasoning, it follows that the power is limited to the owner.[6] And if one has parted with the title, and has thereby ceased to be the owner, his power is at an end.[7] Thus public land, not part of the originally reserved streets, but which had passed to private ownership by municipal grant, cannot be established by the city as a street except pursuant to a dedication by the owner, the

2. Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915; City of Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44; Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178.

3. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

4. Carpenteria School District v. Heath, 56 Cal. 478; Kittle v. Pfeiffer, 22 Cal. 484. See DEEDS.

5. Rice v. Boyd, 2 Cal. Unrep. 196.

6. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936; Huffman v. Hall, 102 Cal. 26, 36 Pac. 417.

7. Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

city no longer having title.[8] A prima facie title is, however, sufficient to support a dedication.[9] And as possession is prima facie evidence of title, that will ordinarily do,[10] although one who is in possession of land under a mere contract of purchase which is never consummated cannot dedicate it to public use, as he is not the owner.[11] The legislature of the state, it seems, may dedicate public land as a street,[12] but it cannot dedicate what has already been dedicated.[13] An administrator[14] and perhaps a tenant in common,[15] have no power to make a dedication. So, also, it seems that a trustee as such has no authority to make an offer of dedication of a street by platting land; but his want of power is immaterial where both trustee and beneficiary sell lots with reference to a map on which the streets are delineated, the public's acceptance by user being operative against both.[16]

§ 6. Dedication by Corporations—*Public corporations.* A municipal corporation owning land may dedicate it as a public street, thereby creating an easement in the public.[17] In so doing the legislative body of the municipality

8. Demartini v. San Francisco, 107 Cal. 402, 40 Pac. 496; People v. Beaudry, 91 Cal. 213, 27 Pac. 610.

9. Watkins v. Lynch, 71 Cal. 21, 11 Pac. 808 (holding that the holder of a certificate of purchase of state school lands, having the prima facie legal title, has power to dedicate the land to public use as a highway).

10. Bigley v. Nunan, 1 Cal. Unrep. 852.

11. Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421 (holding, however, that where one in possession under a contract of purchase opens a road under agreement with his neighbors, which is continuously used by them and the public for eighteen years with the knowledge of and without objection from the holders of the legal title, a finding of a dedication will be sustained).

12. Breed v. Cunningham, 2 Cal. 361.

13. Harter v. San Jose, 141 Cal. 659, 75 Pac. 344.

14. City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235.

15. Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190.

16. Logan v. Rose, 88 Cal. 263, 26 Pac. 106.

17. People v. Beaudry, 91 Cal. 213, 27 Pac. 610; Breed v. Cunningham, 2 Cal. 361. See supra, § 5, as to attempt by city to dedicate pueblo lands after having parted with the title.

exercises powers purely of a governmental nature and not those of a mere property holder.[18]

Private corporations.—If not expressly prohibited by its charter a private corporation, as well as an individual, may dedicate land to public use,[19] and may be so bound by its acts as to estop it from disputing or denying the fact of dedication.[20] This rule applies to private water companies,[1] cemetery corporations,[2] and to railroad corporations.[3] A dedication by a corporation may be shown by its acts,[4] and neither a grant formally made by the directors[5] nor a formal resolution of the board entered on its minutes[6] is essential. But the mere fact that the president and members of a corporation, individually, consent to the public use of corporate land, does not amount to a dedication.[7]

§ 7. Dedication by Agents.—An agent, properly authorized, may make a dedication for his principal,[8] and an

18. McCracken v. City of San Francisco, 16 Cal. 591.

19. Southern Pac. Co. v. City of Pomona, 144 Cal. 339, 77 Pac. 929; Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24; People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728. See CORPORATIONS, vol. 7, p. 76.

20. Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24.

1. Franscioni v. Soledad Land & Water Co., 170 Cal. 221, 149 Pac. 161.

2. Los Angeles C. Assn. v. Los Angeles, 3 Cal. Unrep. 783, 32 Pac. 240.

3. Southern Pac. Co. v. Pomona, 144 Cal. 339, 77 Pac. 929; People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728 (holding that it is not ultra vires for a railroad corporation to dedicate a portion of its land to the public as a highway).

4. People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728. See infra, § 12 et seq.

5. Southern Pac. Co. v. Pomona, 144 Cal. 339, 77 Pac. 929.

6. Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24; People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728 (holding that it is not necessary that a formal resolution of the intention of a corporation to dedicate land should be entered on its records, any more than it is necessary that an individual should execute a written declaration of such a purpose.

7. Pacific Bridge Co. v. Kirkham, 54 Cal. 558.

8. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658 (holding that one who was a member of a syndicate which subdivided a tract, and afterwards an officer and director of the corpora-

ostensible authority, as declared by section 2300 of the Civil Code to arise when the principal intentionally or by want of ordinary care causes a third person to believe that the agent is such, is sufficient.[9] But the agency must be such as to imply at least an authority to make a dedication,[10] unless, indeed, the principal afterwards ratifies the agent's action.[11] Where one acts as agent of a corporation, it is not necessary that his authority be shown by resolution entered in the company's minutes, or by contract in writing. His authority may be shown by evidence that he does business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors or general manager or by their direction.[12]

tion to which title was conveyed, and also a subagent for the sale of lots has authority to represent to purchasers that a certain strip of land is to be a public street, thus evincing an intent on the part of the company that it be dedicated); Southern Pac. Co. v. Pomona, 144 Cal. 339, 77 Pac. 929; People v. Langenour, 25 Cal. App. 44, 142 Pac. 888; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237. As to authority of agents in general, see AGENCY, vol. 2, p. 712 et seq.

9. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658 (holding that agents to whom the entire matter of selling lots in a subdivision is committed have ostensible authority to represent to purchasers that a strip of land, though designated on the map by lot number, is to be used as a public street, and thus effect an offer of dedication); Southern Pac. Co. v. Pomona, 144 Cal. 339, 77 Pac. 929 (holding that where the acts of the agents of a railroad company in consenting to the opening of a street across the company's land, and in treating it in all respects as a public street, are open and notorious and long continued, and the city authorities and public generally are led to believe that they are authorized to dedicate it to public use, an ostensible agency, sufficient for that purpose, arises).

10. California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936 (holding that an agency for the reclamation of swamp-lands along a navigable water does not imply any authority to dedicate a portion of the land to the public for landing purposes).

11. People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728 (holding that the fact that a resolution under which agents of a corporation acted in purchasing land, only authorized them to make the purchase, would not impair an agreement made by them with the vendor to dedicate a portion to public use as a highway, if the corporation afterwards ratified their action).

12. City of Venice v. Short Line Beach etc. Co., 180 Cal. 447, 181

One in possession of land under a contract with the owners for its subdivision and sale, and binding the owners to deed accordingly, has authority as their agent to make an offer to dedicate a road or street to the public. And the execution of the deeds by the owners to purchasers, describing the properties conveyed according to a recorded map of the subdivision on which the road or street is shown, is a ratification of an offer.[13] In such case the question whether the person contracted with was in strictness the owner's agent is immaterial.[14]

§ 8. **Purpose of Dedication in General.**—While the essence of dedication is that it shall be for the use of the public at large, there may be a dedication for a special use,[15] in which case the property dedicated is impressed with such special use and cannot be diverted therefrom.[16] An intention to dedicate to a particular use cannot be considered as implying an intention to dedicate to another and entirely different use. Thus the fact that a strip of land bordering on navigable water has been dedicated as a highway raises no implication that it is also dedicated as a landing.[17] The purpose for which property is dedicated may be ascertained by the designation which the owner has affixed to the land upon a map he has made and filed, whether it be for a street, a school lot or a public park.[18]

Pac. 658. See CORPORATIONS, vol. 6, p. 1096.

13. Koshland v. Spring, 116 Cal. 689, 48 Pac. 58; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094 (saying that this amounts to an offer by the equitable owner on the authority of the holder of the legal title); People v. Langenour, 25 Cal. App. 44, 142 Pac. 888.

14. Koshland v. Spring, 116 Cal. 689, 48 Pac. 58.

15. See 8 Ruling Case Law, p. 882.

16. See infra, § 65.

17. California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936.

18. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839.

§ 9. Particular Purposes.—The principal uses for which lands are commonly dedicated are for roads,[19] streets,[20] alleys,[1] parks and squares,[2] wharves and landings,[3] ferries,[4] public schools,[5] cemeteries,[6] and the like. Lands upon which public buildings, such as courthouses, schoolhouses, jails, hospitals, fire-engine houses, etc., are erected, and which are appurtenant to them, are dedicated to public use.[7] Such properties are as much public, and are governed by the same principles and limitations, as are streets, highways, and public squares. The fact that title resides in the city instead of the state, or that the public benefited by their dedication is of a relatively limited character, or that their control and management are local, does not affect the public quality of their use.[8] So also dedication of property for the purpose of supplying electric power to the inhabitants of a city for their private use, is a dedication to public use.[9] A private corporation, however, with limited membership, over which the public exercises no care or control, is not a public object for which lands can be dedicated by a municipality, though its purpose be the promotion and prosecution of scientific investigation and research, and though the pub-

19. Kittle v. Pfeiffer, 22 Cal. 484.

20. Kittle v. Pfeiffer, 22 Cal. 484; Breed v. Cunningham, 2 Cal. 361.

1. Kittle v. Pfeiffer, 22 Cal. 484.

2. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839 (holding that the principles applicable to the dedication of streets apply to the dedication of parks and squares); Kittle v. Pfeiffer, 22 Cal. 484.

3. California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936; City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247 (holding that a claim that land was dedicated for a public levee is supported by proof of dedication as a public landing, "levee" meaning "landing"); Kittle v. Pfeiffer, 22 Cal. 484.

4. Humboldt County v. Van Duzer, 32 Cal. App. Dec. 924, 192 Pac. 192.

5. Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799.

6. Kittle v. Pfeiffer, 22 Cal. 484. See CEMETERIES, vol. 4, p. 996.

7. Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799; County of Yolo v. Barney, 79 Cal. 375, 12 Am. St. Rep. 152, 21 Pac. 833.

8. Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799.

9. Clark v. Los Angeles, 160 Cal. 30, 116 Pac. 722.

lic derives an incidental benefit from its labors.[10] This includes a private corporation organized for the care of inebriates but having none of the elements of a public agency.[11]

An act of the legislature validating a municipal ordinance for the subdivision of pueblo lands and setting apart portions of them for public use, authorizes dedications for public use, but for none other.[12] And when a board of supervisors has authority, under congressional grant, to set aside municipal lands only for public uses, there can be no presumption that they had set aside a portion of such lands for the use of a private corporation.[13]

§ 10. Property Susceptible of Dedication in General.—The voluntary dedication and acceptance of a public street is sufficient to constitute it such, whether it was a necessary way or not.[14] The requirement of section 2620 of the Political Code that public highways should be forty feet wide and private roads twenty does not apply to roads created by dedication.[15] And when the only limitation on the width of roads in a particular case is that they shall not exceed a specified width, the fact that a strip of land is less wide will not prevent its dedication for road purposes.[16]

Dedication of cul-de-sac.—Whether a cul-de-sac can be a public highway has been a mooted question. However, it may perhaps be correctly said that it is not a legal impossibility for a cul-de-sac, though not a thoroughfare, to

10. California Academy of Sciences v. San Francisco, 107 Cal. 334, 40 Pac. 426.

11. Home etc. of Inebriates v. San Francisco, 119 Cal. 534, 51 Pac. 950.

12. California Academy of Sciences v. San Francisco, 107 Cal. 334, 40 Pac. 426.

13. Home etc. of Inebriates v. San Francisco, 119 Cal. 534, 51 Pac. 950.

14. Brown v. Stark, 83 Cal. 636, 24 Pac. 162.

15. Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421.

16. Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864.

be dedicated as a public highway.[17] But in such case a verdict or finding that such a choked up and abortive passage is a public highway should be supported by very clear and satisfactory evidence; and it has been said that certainly a verdict that it is not a public highway should not be disturbed on appeal, unless the evidence is almost overwhelmingly the other way. The question is mainly one for the jury, and it is always a strong circumstance to a jury that the way leads nowhere.[18]

§ 11. Possession and Interest.—Lands held in adverse possession cannot be dedicated to public use by their owner.[19] This rule, however, does not apply to lands owned by a municipality.[20] And, a fortiori, the occupation of pueblo lands by a trespasser would not prevent their dedication by the municipality to public use.[1]

Dedication of homestead.—Notwithstanding a doubt expressed in an early case as to whether the signature of the wife was necessary to validate the dedication of a portion of a homestead as a street, the public taking only an easement,[2] it is now well settled that an owner has no power to dedicate to public use, in derogation of the rights of his wife, land on which he has declared a homestead.[3] A dedication of property as a public street creates an encumbrance, and, where the property is covered by a homestead, cannot be made by the husband alone. It may,

17. Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646; Helm v. McClure, 107 Cal. 199, 40 Pac. 437; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Stone v. Brooks, 35 Cal. 489.

18. Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646. Compare APPEAL AND ERROR, vol. 2, p. 920.

19. Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433.

20. Holladay v. San Francisco, 124 Cal. 352, 57 Pac. 146. As to adverse possession of public lands, see ADVERSE POSSESSION, vol. 1, p. 497 et seq.

1. Mills v. City of Los Angeles, 90 Cal. 522, 27 Pac. 354.

2. Kittle v. Pfeiffer, 22 Cal. 484.

3. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; People v. Myring, 144 Cal. 351, 77 Pac. 975; San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127.

therefore, be questioned whether there can be a dedication of land selected as a homestead by a married person in any manner other than by an instrument executed and acknowledged by both spouses, as required by section 1242 of the Civil Code for the conveyance of homesteads.[4] Yet the dedication which is presumed from adverse user by the public operates as an estoppel against both, and is independent of any question of homestead.[5]

III. MODE OF DEDICATION.

Elements of Dedication.

§ 12. In General—Intent.—Dedication is the joint effect of an offer by the owner to dedicate land and an acceptance of the offer by the public;[6] and to constitute a valid and complete dedication two things must generally concur, to wit: An intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use,[7] and

4. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227. See HOMESTEADS.

5. People v. Myring, 144 Cal. 351, 77 Pac. 975. See infra, §§ 32–40.

6. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688; City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

7. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; City of San Diego v. Hall, 180 Cal. 165, 179 Pac. 889; F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 Pac. 62; Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Demartini v. San Francisco, 107 Cal. 402, 40 Pac. 496; Huffman v. Hull, 102 Cal. 26, 36 Pac. 417; People v. Dreher, 101 Cal. 271, 35 Pac. 867; City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; People v. Blake, 60 Cal. 497; San Francisco v. Canavan, 42 Cal. 541; Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421; Hartley v. Vermillion, 7 Cal. Unrep. 15, 70 Pac. 273; Hibberd v. Mellville, 3 Cal. Unrep. 879, 33 Pac. 201; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

an acceptance by the public of the dedication.[8] Whatever the manner in which a dedication is effectuated, the animus dedicandi is paramount. It is the soul of every act of dedication,[9] and must expressly appear, or be fairly inferable from the donor's acts.[10] It has been said that dedication is, in each case, a question of intention.[11]

"The vital principle of the dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made."[12]

§ 13. Necessity That Intent be Clear and Unequivocal. It is not a trivial thing to take another's land, and for this reason the courts do not lightly declare a dedication to public use.[13] Parties cannot be done out of their property by doubtful implications, no matter how greatly the public may be inconvenienced.[14] Hence dedication is never presumed without unequivocal evidence of intention on the part of the owner.[15] Where there is no grant in writing,

8. See infra, § 43, as to necessity of acceptance.

9. City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693.

10. California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936; People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203; Silva v. Spangler, 5 Cal. Unrep. 277, 43 Pac. 617.

11. City of Los Angeles v. McCollum, 156 Cal. 148, 103 Pac. 914; City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439; Griffiths v. Galindo, 86 Cal. 192, 24 Pac. 1025; Phillips v. Day, 82 Cal. 24, 22 Pac. 976; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

12. Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Harding v. Jasper, 14 Cal. 642; Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864; Hibberd v. Mellville, 3 Cal. Unrep. 879, 33 Pac. 201.

13. Allen v. Railroad Commission, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466; San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127.

14. Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154; Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

15. Allen v. Railroad Commission, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466; Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Demartini v. San Francisco, 107 Cal. 402, 40 Pac. 496; Huffman v. Hall, 102 Cal. 26, 36 Pac. 417; Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Hibberd v. Mellville, 3 Cal. Unrep.

a dedication can only be established by proof of act and conduct which manifest clearly and unequivocally the intent to dedicate.[16] By this, however, it is not meant that the testimony must be direct and positive upon the point, and that no inferences of fact may be drawn. Every case must depend upon its own peculiar facts and circumstances, and must be determined upon its own conditions and surroundings.[17] But in any case there must be evidence showing an intention to abandon or dedicate the land to the use of the public, or proven facts from which such intention can be fairly deduced,[18] or, what amounts to substantially the same thing, facts such as to estop him from denying that such was his intent.[19]

"Has the owner freely given, or is he by some act estopped from denying that he has, is the real inquiry in every case."[20]

§ 14. Acts Manifesting Intent Generally.—The intention to which courts give heed is not an intention hidden in the mind of the land owner, but an intention manifested by his acts, and finding expression in his conduct.[1] A

879, 33 Pac. 201; Newell v. Redondo Water Co., 36 Cal. App. Dec. 626, 202 Pac. 914.

16. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127; People v. Sperry, 116 Cal. 593, 48 Pac. 723; Helm v. McClure, 107 Cal. 199, 40 Pac. 437; People v. Dreher, 101 Cal. 271, 35 Pac. 867; Latham v. City of Los Angeles, 87 Cal. 514, 25 Pac. 673; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; Harding v. Jasper, 14 Cal. 642; Hartley v. Vermillion, 7 Cal. Unrep. 15, 70 Pac. 273; Los Angeles Cemetery Assn. v. Los Angeles, 3 Cal. Unrep. 783, 32 Pac. 240; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

17. London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

18. United States v. Rindge, 208 Fed. 611.

19. City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439; Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417. See infra, §§ 28, 49.

20. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

1. City of Los Angeles v. McCollum, 156 Cal. 148, 103 Pac. 914;

mere unexecuted intention is not sufficient.[2] The animus dedicandi must include not only a general intention that at some time or other the land shall be surrendered to the use of the public, but a present offer,—an act of giving.[3] In dedication, no particular formality is necessary.[4] It may be established in any conceivable way in which the intention of the owner may be manifested,[5] that is to say, it may be made by deed,[6] or by an unsealed writing,[7] and in other ways.[8] A dedication is not affected by the statute of frauds,[9] and need not be evidenced by writing,[10]

Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Griffiths v. Galindo, 86 Cal. 192, 24 Pac. 1025; Phillips v. Day, 82 Cal. 24, 22 Pac. 976.

2. Shultz v. Redondo Improvement Co., 156 Cal. 439, 105 Pac. 118.

3. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

4. Sears v. Tuolumne County, 132 Cal. 167, 64 Pac. 270; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Harding v. Jasper, 14 Cal. 642; Spaulding v. Wesson, 5 Cal. Unrep. 399, 45 Pac. 807; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

5. Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24; City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Harding v. Jasper, 14 Cal. 642; San Francisco v. Scott, 4 Cal. 114; Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864; United States v. Rindge, 208 Fed. 611. As to evidence of intent, see infra, § 55.

6. Harding v. Jasper, 14 Cal. 642; San Francisco v. Scott, 4 Cal. 114. See infra, § 21.

7. Sears v. Tuolumne County, 132 Cal. 167, 64 Pac. 270; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Harding v. Jasper, 14 Cal. 642; Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421. See infra, §§ 22–31.

8. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; Sears v. Tuolumne County, 132 Cal. 167, 64 Pac. 270; People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247 (a dedication need not be made by map); Hope v. Barnett, 78 Cal. 9, 20 Pac. 245; Carpenteria School District v. Heath, 56 Cal. 478; Kittle v. Pfeiffer, 22 Cal. 484; Harding v. Jasper, 14 Cal. 642; Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421; United States v. Rindge, 208 Fed. 611; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237. See supra, § 6, as to formalities in dedication by corporations. See infra, § 22 et seq.

9. Sears v. Tuolumne County, 132 Cal. 167, 64 Pac. 270; Harding v. Jasper, 14 Cal. 642.

10. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; City of Napa v. Howland, 87 Cal. 84, 25

nor, indeed, be in form of words, oral or written,[11] but may be implied from the conduct of the owner,[12] or may be presumed from the lapse of time or acquiescence of the party.[13] Indeed, dedication is so proved in most cases.[14] But in any event, it is necessary that there should be some act of the owner, or assent by him to use by the public, sufficient to show an intent to dedicate.[15]

§ 15. Varieties of Dedication—Express and Implied.—As appears from the statements in the last two paragraphs, a common-law dedication may be express or implied. It is express when there is a direct manifestation on the part of the owner of his purpose to devote the land to a particular use, as in the case of a grant evidenced by a writing;[16] and it is implied when the acts and conduct of the owner indicate clearly an intention to devote the land to the public use.[17] The rule has been well stated in the following language: "There are two kinds of dedication, viz., statutory and common-law dedication. . . . In order to constitute a valid statutory dedication, the provisions of the statute, whatever they may be, must be substantially complied with. Common-law dedications are, for convenience of description, frequently divided by law-writers into two classes; express dedications and implied dedications. The substantial difference

Pac. 247; Harding v. Jasper, 14 Cal. 642; San Francisco v. Scott, 4 Cal. 114; Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

11. United States v. Rindge, 208 Fed. 611.

12. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421; United States v. Rindge, 208 Fed. 611. See infra, § 22.

13. Sears v. Tuolumne County, 132 Cal. 167, 64 Pac. 270; San Francisco v. Scott, 4 Cal. 114. See infra, §§ 32–40.

14. Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

15. Hope v. Barnett, 78 Cal. 9, 20 Pac. 245. See supra, § 12.

16. See infra, § 22.

17. People v. Myring, 144 Cal. 351, 77 Pac. 975; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839. See supra, § 13, and infra, § 22 et seq.

between the two consists in the mode of proof. In the former case the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting the purpose, while in the latter it is usually by such acts or conduct not directly manifesting the intention, but from which the law will imply the intent."[18] In many instances a dedication invalid as a statutory one will be a good common-law dedication.[19]

§ 16. Conclusive Character of Dedication.—It is an essential requisite to the validity of a dedication that it be of such a character as to conclude the land owner.[20] An intention on the part of the owner to retain control of the property is wholly inconsistent with a legal dedication. So there must be an abandonment by the owner to the use of the public exclusively, not a mere use by the public in connection with a user by the owner in such measure as he may desire.[1] Likewise, it is one of the essential elements of a good dedication that it shall be irrevocable, and that the land shall be forever dedicated to the public use which is designated, provided the public see fit to use it for that purpose. The reservation in the deed of dedication of a right in the grantor to revoke the dedication at his pleasure and devote the land to other uses would destroy the effect of the dedication.[2] The latter rule, however, does not apply to municipalities so as to destroy the effect, as a dedication, of their purchase of

18. People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203, per Searls, C. And see to the same effect, Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24.

19. People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203 (quoting Elliott on Roads and Streets).

20. People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203; Spaulding v. Wesson, 5 Cal. Unrep. 399, 45 Pac. 807.

1. California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936. See infra, § 63, as to partial, conditional and qualified dedications.

2. San Francisco v. Canavan, 42 Cal. 541. See infra, § 62, as to dedication concluding property owner from assertion of adverse right or interest.

land and devotion of it to public use, merely because they have power to change the use, or even sell the land in the manner provided by statute.[3]

§ 17. By Public Authority in General—*By the United States.*—The act of congress of 1866,[4] granting the right of way over public lands of the United States for public highways, operates as an offer of dedication. And when this offer is accepted by acts of the state legislature, the status of the highways is established.[5] The setting apart of its lands by the United States, for a marine hospital or other public institution, the appropriation by congress of moneys for the support thereof, the construction of building and inclosure of land, show a dedication to public use.[6]

By the state.—A legislative grant of property to a municipality by reference to a named street does not operate as a dedication when the legislative intent is merely to fix a boundary.[7] For the same reason, an act incorporating a town and fixing its boundaries by reference to streets by the name indicated upon an unauthorized map does not operate as a dedication of the streets named.[8]

3. County of Yolo v. Barney, 79 Cal. 375, 12 Am. St. Rep. 152, 21 Pac. 833. But see San Francisco v. Canavan, 42 Cal. 541 (holding that a city ordinance dedicating municipal lands as a public park, which provided that nothing therein should prevent the city from devoting the lands to other public purposes, rendered the attempted dedication ineffective). See infra, § 65, as to diversion by municipality of dedicated municipal lands.

4. U. S. Rev. Stats., § 2477.

5. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448 (construing Stats. 1869–70, p. 457, applicable to Placer County); McRose v. Bottyer (Rose v. Bottyer), 81 Cal. 122, 22 Pac. 393, applying the act of March 20, 1874 (Stats. 1874, p. 503), relating to Butte county.

6. United States v. Carr, 3 Sawy. 477, Fed. Cas. No. 14,731.

7. People v. Dana, 22 Cal. 11; People v. Kruger, 19 Cal. 411.

8. City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439, construing Stats. 1856, p. 103, incorporating Eureka, and holding also that a municipal ordinance employing a surveyor to "run off and set a stake at the corners of all the blocks lying between A and N streets," is not a dedication of A street to public use.

But where a municipal corporation sells lots along the line of a street as shown by the official map of the city, and these sales are afterwards confirmed by the legislature by an act recognizing the street as a public thoroughfare, this legislation operates as a grant by which abutting property holders and the public generally are entitled to the free enjoyment of the street.[9] And a statute[10] dedicating a portion of a street covered by navigable waters to a city as a canal, and empowering the city authorities to erect drawbridges over it operates as an offer to dedicate, but is ineffective until the city accepts it by making the specified improvements.[11]

§ 18. By Municipalities in General.—Adopting by ordinance a map as an official map of the city, constitutes a dedication of streets thereon shown if the land represented thereby was owned by the municipality. And it is not necessary that the streets should have been actually constructed and made ready for public travel.[12] So, also, the delineation of a street on a map of pueblo lands, tracts on both sides being granted to private owners, creates an easement of way in favor of the abutting owners, and indicates an intention on the part of the town to dedicate the space as a highway.[13] Where, by resolution of the governing body of a city, land is surveyed as a public park, and by act reincorporating the city, the park as thus defined is declared to be a public park, the proceed-

9. Breed v. Cunningham, 2 Cal. 361. See infra, §§ 18, 19.

10. Stats. 1871–72, p. 926, §§ 1–4.

11. People v. Williams, 64 Cal. 498, 2 Pac. 393.

12. People v. Beaudry, 91 Cal. 213, 27 Pac. 610. See also Home etc. of Inebriates v. San Francisco, 119 Cal. 534, 51 Pac. 950, holding a square on a map designated as "Home for Inebriates" was dedicated to public use, the ordinance adopting the map having been ratified by act of the legislature.

13. San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482. See, however, Breed v. Cunningham, 2 Cal. 361 and San Francisco v. Burr, 4 Cal. Unrep. 634, 36 Pac. 771 (holding that where a city sells lots bounded on a street as shown on an official map, the dedication of the street by the city is complete).

ings constitute a dedication by the city, to itself.[14] And a municipal ordinance setting apart and dedicating certain municipally owned land as a free public dock, amounts to an offer to dedicate, which becomes effectual when actually used in the manner intended.[15]

§ 19. **The Van Ness Ordinance.**—The city of San Francisco is the successor of a Mexican pueblo, and as such came into possession of so-called pueblo lands, which the pueblo had held in trust for certain public purposes, though the ultimate title had rested in the Mexican government, and passed by the treaty of 1848, to the United States.[16] In 1855, the city of San Francisco passed an ordinance, known as the Van Ness Ordinance, attempting to grant these lands to the occupants, reserving public streets, and the right to select engine-house lots, schoolhouse lots, and public squares; but this ordinance was void.[17] Later another ordinance was passed providing for the election of commissioners to make these selections. While the commissioners chosen failed to report within six months, the map made by them was eventually adopted, and became known as the Van Ness map. In March, 1858, the legislature passed an act which recited the passage of these ordinances and the confirmation of the map, and ratified and confirmed all of them.[18] And in July, 1864, congress passed an act relinquishing to San Francisco the title of the United States to the pueblo lands, for the purposes specified in the ordinances, ex-

14. Harter v. San Jose, 141 Cal. 659, 75 Pac. 344.

15. San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542.

16. See Hart v. Burnett, 15 Cal. 530, for an elaborate discussion and historical review concerning the pueblo lands.

17. Holladay v. San Francisco, 124 Cal. 352, 57 Pac. 146.

18. Stats. 1858, p. 58.

A provision in the Van Ness Ordinance that more than one-twentieth of land in private possession should not be occupied for public purposes without compensation was superseded by the Van Ness map and confirmatory legislation; City & County of San Francisco v. Sharp, 125 Cal. 534, 58 Pac. 173.

cepting certain reservations for government use.[19] An unprecedented amount of litigation, now happily terminated, arose from this state of affairs, which is of interest here only in so far as it concerns the dedications made by the reservations of streets, squares, and other public spaces on the Van Ness map. It has been repeatedly held that the legislative confirmation of the Van Ness Ordinance operated as a selection and dedication of the parcels designated on the Van Ness map as reserved for public use,[20] and that the act of congress had the effect of confirming the dedication and making it operative on the legal title.[1] It has also been held that the action of the state legislature amounted to an acceptance of the dedication, and that further acceptance by the public was unnecessary.[2] The act of congress of March 8, 1866,[3] relinquishing to San Francisco the title to pueblo lands, effected a dedication of a street previously reserved by ordinance, as well as those subsequently reserved.[4] But the Van Ness map and confirmatory legislation did not

19. 12 U. S. Stats. at Large, p. 333. See Hoadley v. San Francisco, 50 Cal. 265, for a history of the matter.

20. City & County of San Francisco v. Sharp, 125 Cal. 534, 58 Pac. 173 (holding that an occupant of pueblo lands dedicated to public use by the Van Ness map of San Francisco and its adoption, and the confirmation thereof by the legislature, had no title or estate in the land which necessitated compensation to him); Holladay v. San Francisco, 124 Cal. 352, 57 Pac. 146; San Francisco v. Mooney, 106 Cal. 586, 39 Pac. 852 (holding that the failure to prepare the map in the time limited by the ordinance was immaterial); People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; Hoadley v. San Francisco, 70 Cal. 320, 12 Pac. 125; S. C., 50 Cal. 265; Pacific Gas Imp. Co. v. Ellert, 64 Fed. 421 (including in the ruling the subsequent statute of April 25, 1862, declaring streets shown on the Van Ness map to be public streets). See supra, § 17, as to dedication by the state in general.

1. Holladay v. San Francisco, 124 Cal. 352, 57 Pac. 146 (holding that the dedication really derived its force from the federal statute, since the title was in the federal government); People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; S. C., 68 Cal. 439, 9 Pac. 655; Hoadley v. San Francisco, 50 Cal. 265.

2. Hoadley v. San Francisco, 70 Cal. 320, 12 Pac. 125; S. C., 50 Cal. 265. As to acceptance in general, see infra, §§ 41–47.

3. 14 Stats. at Large, p. 4.

4. Bigley v. Nunan, 1 Cal. Unrep. 855.

operate as a dedication of prolongations of streets on the map into unauthorized territory.[5]

§ 20. Dedication of Private Property by Municipality. Under the provision of the constitution that private property shall not be taken for public use without just compensation, a municipal ordinance opening a street does not operate, ex proprio vigore, and before compensation has actually been paid the property holder, as a dedication of the street to the public use.[6] The delineation of a strip of land on official maps of a city as a street does not of itself create any conclusive presumption that it has become such, either by dedication or otherwise;[7] nor is it, of itself, evidence either of dedication or user.[8] And official maps, made by a city pursuant to statute but subsequent to the revocation of an offer to dedicate cannot affect the rights of private owners, though they show the land in question as a public street.[9] They amount at most to a suggestion to the owners that they dedicate such land to public use. A reference to such a map by the owners does not constitute an offer to dedicate when the reference is merely for the purpose of description.[10]

§ 21. By Conveyance of Private Owner.—As already indicated, an individual owner of land may make an express dedication thereof by deed.[11] A complete dedication arises where there is a conveyance made to a city, or to someone for the benefit of the public.[12] A quitclaim deed to "the present and future owners of town lots and town property," in a certain city, "for the public use of

5. Knight v. All Persons, etc., 32 Cal. App. 381, 162 Pac. 1051.

6. San Francisco v. Scott, 4 Cal. 114.

7. Demartini v. San Francisco, 107 Cal. 402, 40 Pac. 496.

8. Cook v. Sudden, 94 Cal. 443, 29 Pac. 949.

9. Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

10. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417. See infra, § 25 et seq.

11. See supra, § 15.

12 Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

the inhabitants . . . to be applied to such public purposes as the future incorporated authorities of said city from time to time declare and determine," is good as a dedication.[13] A map, delineating a road, made by appraisers appointed by a board of supervisors, a deed for valuable consideration of the fee of the road to the county, and the public use of the road, constitute a dedication.[14] So also a recital in a deed that a certain strip conveyed is to be used exclusively for street purposes, together with a reference to a certain map, afterwards recorded by the grantee, showing a street contiguous to the strip, indicates a clear offer to dedicate the street to public use.[15] A conveyance of highways as delineated on a recorded map, to the county, upon express condition that the county shall "accept, declare, duly establish, and use, the same as public highways," is a mere offer to dedicate, which will become effectual when accepted according to its terms and conditions.[16] Again, declarations in deeds made by the owner of a tract to purchasers of subdivisions, by which he also grants rights in another parcel as a public park will, it seems, amount to sufficient evidence of an offer of dedication to public use. But they are mere admissions of an intent to dedicate, and are not an express dedication, or evidence thereof.[17] A land owner who sells a neighbor a strip of land to furnish him a means of access to a road is estopped as to his grantee from denying that the road in question has been dedicated to public use.[18] But a deed to improved property, which the grantee can have no interest in having dedicated to public use, does not constitute an offer of dedication by the grantor, though it

13. Mayo v. Wood, 50 Cal. 171.

14. Humboldt County v. Van Duzer, 32 Cal. App. Dec. 924, 192 Pac. 192.

15. Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864.

16. Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770.

17. Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

18. Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987.

describes the property as being a portion of a street.[19] And a deed of a married woman, naming the husband alone in the body of the instrument as the grantor of land for a road, is ineffectual as a dedication of her interest, since it manifests no such intent on her part.[20]

Reservations in deeds. — Reservations of connecting strips of land "for road purposes," made by a land owner in his conveyances, the strips so reserved having been in fact used as a highway for years, constitute a dedication of them to public use.[1] But where a way is reserved in a private conveyance for the benefit of the grantor, or that of both parties, no presumption arises of any intent to dedicate the way to public use.[2]

§ 22. By Other Acts or Declarations of Owners.—It has already been pointed out that an intention to dedicate may be inferred from the acts and conduct of the owner of land.[3] The character of the acts required depends very much upon the situation of the lands, its surroundings, uses, and a variety of other circumstances tending to illustrate the intent.[4] However, throwing open land to public travel,[5] or platting it and selling lots bounded by streets designated in the plat,[6] or an acquiescence in the use of the land for a highway,[7] or a declared assent to such use, are a sufficient dedication of the property

19. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

20. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227.

1. Santa Ana v. Santa Ana Valley Irr. Co., 163 Cal. 211, 124 Pac. 847.

2. Taft v. Tarpey, 125 Cal. 376, 58 Pac. 24, holding that a reservation, in a conveyance between private individuals, of a right of way over a strip of the land "for canal or road purposes, both or either," is not a dedication to public use, being for the benefit of the grantor alone.

3. See supra, § 14.

4. Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746.

5. Sears v. Tuolumne County, 132 Cal. 167, 64 Pac. 270; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Harding v. Jasper, 14 Cal. 642.

6. See infra, §§ 26–31.

7. See infra, § 32 et seq.

to the public as a highway.[8] The effect of the acts of the owner are not affected by the fact that he was induced to act by considerations moving from third persons and that considerations failed. A dedication is made to the public alone, and such proof if of any effect strengthens the proof of dedication.[9]

Declarations and resolutions.—A mere statement of an owner of land that it constitutes a part of a street is not an offer to dedicate it,[10] though competent as evidence of intent.[11] But a resolution of the board of directors of a corporation that certain land owned by it be granted to a city as a street is operative as an offer of dedication, though the deed made by the corporation officials, pursuant to the resolution, is defective and carries no title.[12]

Toll roads and bridges.—By the act of constructing and opening a toll road across his land, and allowing its use by the public on payment of tolls, the land owner dedicates it to public use.[13] The fact that the use is allowed only on payment of tolls does not affect the question of dedication.[14] These same principles apply to a toll bridge.[15]

Demarcation by fences.—Fencing a road across his land on both sides indicates a clear intention on the part of a land owner to dedicate it to public use.[16] And where, in addition, the owner allows the road to be used by the public and worked and controlled by public au-

8. Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Harding v. Jasper, 14 Cal. 642.

9. McKenzie v. Gilmore, 3 Cal. Unrep. 886, 33 Pac. 262.

10. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

11. See infra, § 55.

12. Los Angeles Cemetery Assn. v. Los Angeles, 95 Cal. 420, 30 Pac. 523. See supra, § 6.

13. Blood v. Woods, 95 Cal. 78, 30 Pac. 129; People v. Davidson, 79 Cal. 166, 21 Pac. 538. See TURNPIKES AND TOLL ROADS.

14. Blood v. Woods, 95 Cal. 78, 30 Pac. 129.

15. Sears v. Tuolumne County, 132 Cal. 167, 64 Pac. 270.

16. Sherwood v. Ahart, 35 Cal. App. 84, 169 Pac. 240.

thorities, the dedication is complete.[17] So, where a street is defined by fences after a considerable period of public use, and the owner declares it to be a street and that he intends it as such, there is a dedication.[18] Where owners of lots on both sides of a block agree between themselves to give certain space in the rear of their lots to form an alley, and this is done, and all subsequent conveyances are made with reference to the alley, there is an offer to dedicate the alley to public use.[19] But the fact that abutting owners moved their fences back a certain distance each to leave, as they declared, a passageway, fails to show a dedication where they continued to exercise control over it and the street, though used by the public, was never accepted, graded or improved by public authorities.[20]

§ 23. Description of Land as Bounding on Street.—Selling lots as fronting on or bounded by a certain space designated in the conveyance as a street ordinarily amounts to a dedication,[1] or at least to an offer of dedication, which will become complete when accepted within a reasonable time and before revocation.[2] The rule is the same whether the lot is bounded by the center of the street or the side of it. Under this rule, where an owner deeds certain land to a city for a public street, and afterwards mortgages adjacent lots describing them as bounded by such street, there is a dedication, and a right of way is vested in the mortgagees, even though the deed to the city was not accepted or the space previously used as a street. In such a case the deed to the city can be referred

17. McKenzie v. Gilmore, 3 Cal. Unrep. 886, 33 Pac. 262. See infra, § 46.

18. Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

19. Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

20. Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190. See infra, § 38 as to implied dedication by user of strip of land laid out by owners.

1. Kittle v. Pfeiffer, 22 Cal. 484; Breed v. Cunningham, 2 Cal. 361; City of Eureka v. Croghan, 3 Cal. Unrep. 24, 19 Pac. 485.

2. City of Eureka v. Gates, 137 Cal. 89, 69 Pac. 850; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928.

to as showing the width of the street, if for no other purpose.[3] A deed bounding land upon a street merely existing upon a map or plat made by the owner as a convenience in selling implies, in favor of the grantee, that the street is there according to the description. There is no such implied covenant in a deed describing land as bounded upon a public highway established by public authority. And the rule would seem to be the same where a highway has been laid out, but not yet opened, by public authority.[4] Much less should the mention, in a deed, of streets platted by town authorities or otherwise, but without the owner's consent, have such effect, even though the deed be that of the owner of the streets or those claiming under him.[5] And similarly, a reference for purposes of description to an unauthorized map does not estop the grantor from claiming as his private property a street shown on the map, though not bounding the land conveyed.[6]

§ 24. Special Applications of the Rule.—Selling parcels of land bordering on a cul-de-sac, stating to the purchasers that the cul-de-sac was a street and always would be, fencing the further end of it, and acquiescing in its use by the public, are acts sufficient to constitute a dedication.[7] An offer to dedicate a street as extended, as implied by a deed describing the land conveyed as bounding on the street, will be held to apply to an extension of the street, through the entire block, as it will not be presumed that the intention was to create a

3. Kittle v. Pfeiffer, 22 Cal. 484.

4. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

5. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693.

6. City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235. See supra, § 18, as to effect of sale by city of lots as bounded on street shown on official map. See infra, §§ 26–31, as to effect of sale of lots according to map on which streets or roads are delineated.

7. Helm v. McClure, 107 Cal. 199, 40 Pac. 437.

cul-de-sac.[8] Evidence that land was platted as a street under certain ordinances, that defendant's grantor described his property as bounded by the street in a declaration of homestead and in the conveyances to defendant, that defendant acquiesced in its use by the public, warrants a finding of dedication and acceptance as against defendant.[9] And it seems that the adoption, by tenants in common, of the official map of the city showing the subdivision of their tract, for the purpose of effecting a partition of the property, and the apportioning of the land, excepting such portions as are designated on the map and used as public squares, would amount to a dedication of the excluded squares to public use.[10] But the mere fact that a plaintiff in ejectment describes his property in the complaint as commencing near the corner of two named streets does not prove an intention on his part to dedicate a portion of his land as one of the streets.[11]

By Map or Sale by Map.

§ 25. Making and Recording of a Map.—The act of a land owner in making a map or plat of his land on which a road or street is delineated, without filing it for record or doing anything further, is not an offer of dedication, and is ineffective for any purpose.[12] But where an owner makes a map of his land and files it for record, the cases are uniform that this act constitutes an offer to dedicate the streets, roads and public spaces shown on it to public

8. City of Eureka v. Gates, 137 Cal. 89, 69 Pac. 850; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928.

9. Spaulding v. Wesson, 5 Cal. Unrep. 399, 45 Pac. 807.

10. Casserly v. County of Alameda, 153 Cal. 170, 94 Pac. 765.

11. Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47.

12. Cook v. Sudden, 94 Cal. 443, 29 Pac. 949; Phillips v. Day, 82 Cal. 24, 22 Pac. 976 (holding that the case is not helped by the fact that a subsequent grantee to whom the land has been conveyed in a body filed the map for record on the same day that he also conveyed it in a body); People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474. But see Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac.

use.[13] And in this connection, it is immaterial for what purpose the recorded map was made, whether only for the purpose of effecting a partition amongst the owners themselves, or otherwise.[14] Such acts, however, constitute no more than a mere offer, and as such may be withdrawn at any time before acceptance,[15] unless the map bears words of dedication on its face.[16] The rule does not apply to a map subdividing into lots all the portion of a tract outside

591 (containing a dictum to the apparent effect that delineating a street on a map would be an offer of dedication).

13. Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915; West Berkeley Land Co. v. Berkeley, 164 Cal. 406, 129 Pac. 281 (dedication held complete upon acceptance); City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855 (map showing plaza); Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770; Southern Pacific R. R. Co. v. Ferries, 93 Cal. 263, 18 L. R. A. 510, 28 Pac. 828; People v. Hibernia Savings etc. Society, 84 Cal. 634, 24 Pac. 295 (where the owner fenced the street delineated on the map and threw it open to public use, and it was subsequently shown on official maps); People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141 (map of town site); Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692; Shermaster v. California Home Bldg. Loan Co., 40 Cal. App. 661, 181 Pac. 409; People v. Langenour, 25 Cal. App. 44, 142 Pac. 888; Bigley v. Nunan, 1 Cal. Unrep. 852 (in which the map was accompanied by a declaration that all sales would be made according to it); Groghan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498. See Los Angeles Cemetery Assn. v. Los Angeles, 3 Cal. Unrep. 783, 32 Pac. 240, holding that the filing of a map platting a cemetery and showing a colored strip, extending along one border from which entrance is had to the grounds, planting a hedge fence along the inner border, opening the strip to public travel, and allowing such travel without objection, show an intention to dedicate with requisite clearness.

14. London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

15. Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770 (when the highways were also marked on the ground); Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141 (map of town site); Shermaster v. California Home Bldg. Loan Co., 40 Cal. App. 661, 181 Pac. 409. See infra, § 41.

16. Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686. See infra, § 41.

a certain strip, where the strip itself does not appear on the map.[17]

Since 1893, legislation in California has required that before sales are made of lots in a subdivided tract by reference to a map, the map shall be first recorded. The present statute,[18] among other requirements, makes it necessary that the map shall set forth all parcels of ground used for public purposes, or offered for dedication to public uses. A violation of the statute is made a misdemeanor.

Maps not made by owners.—The making and recording of a map, without the authorization or consent of a land owner, showing his land subdivided into lots and streets, is not a dedication or offer of dedication,[19] even when the owner knows of the recordation.[20] The rule is otherwise, however, where the map is signed by land owners by their attorney in fact, and expressly referred to in their deeds of partition amongst themselves.[1] And the act of an owner in adopting and recording a map made by others is equivalent to his act in making and recording his own map.[2]

§ 26. Sale of Lots by Unrecorded Map.—The sale of lots by reference to a map on which streets or roads are shown is a circumstance the legal effect of which has been so divergently viewed by the California courts, that it is not

17. Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190. See infra, § 57, as to evidentiary effect of maps.

18. Stats. 1907, p. 290, as amended by Stats. 1913, p. 568; Stats. 1915, p. 1512, and Stats. 1919, pp. 164, 177, 725; Act 2065, Gen. Laws 1915, p. 809, and Supp. 1919, p. 1376.

19. Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154; City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439; City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693. The rule is the same when the unauthorized map is made by public authorities: Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961; Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

20. Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154.

1. London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

2. People v. Blake, 60 Cal. 497.

too much to say that the law is still in a confused and extremely unsatisfactory state. The earlier doctrine regarded the sale of lots by an unrecorded map as an offer to dedicate to public use the streets and public spaces shown on it,[3] which offer resulted in a complete dedication when followed by acceptance, by user or otherwise.[4] A doctrine substantially contrary to this, though not very clearly enunciated in the cases supporting it, arose from a series of decisions of later origin, to the effect that though the sale of lots by an unrecorded map worked an estoppel against the land owner and in favor of the purchasers which entitled the latter to maintain the streets shown on the map as open ways,[5] this performance creates no right or interest in the public, and would seem, logically, to be not even an offer of dedication, though the doctrine is

3. City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235 (holding, however, that the reference in a conveyance by a land owner to an unrecorded map of his land for purposes of description, the map not having been authorized and being otherwise repudiated by him, has no substantial tendency to prove that he intended to dedicate a street delineated on the map but not adjacent to the lots sold nor referred to in the description); Logan v. Rose, 88 Cal. 263, 26 Pac. 106; Stone v. Brooks, 35 Cal. 489 (saying that the act of laying out a tract of land into lots purporting to bound on streets, and selling the lots without limitation, was an act, i. e., offer, of dedication. In this case the way in question was an extension of a cul-de-sac).

A grantee who accepts a conveyance of lots shown on an unrecorded map made by the grantor on which a street is delineated and who afterwards sells the lots by reference to the street, thereby acquiesces in the dedicatory acts of his grantor. City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235.

4. Brown v. Stark, 83 Cal. 636, 24 Pac. 162 (holding that platting a tract of land with a street running through it, posting the map on the premises, selling lots on the faith of the map and as bounded by the street, and throwing the street open to public travel, constitute a dedication of the street to public use, which is not affected by the owner's unexpressed intention to create only a private way); Myers v. Kenyon, 7 Cal. App. 112, 93 Pac. 888 (holding that platting a block with an alley through its center, fencing the lots on both sides with gates opening into it; and selling the lots by exhibiting a map showing the alley, which is thenceforward used as such, amounts to a dedication of it).

5. See Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178 (when, however, the streets were marked on the ground and not on a map).

scarcely pressed to this logical result.[6] In inaugurating this later doctrine, Justice Works said:

"Much of the confusion in the decided cases has, in our judgment, grown out of the failure to distinguish between the right of public authorities to claim a dedication, and the right of a purchaser to compel the opening of a street on the ground of estoppel. . . . If the purchaser of property asserts his rights, the result may be the same, as to the mere keeping open of the street, as if a dedication is claimed by the public; but it does not follow that if he waives his right, the public can assert it, nor can the purchaser, by asserting his right to an open way, impose on the public the duty of keeping a street in repair that has never been accepted."[7]

It has been held that conveyances of lots platted to abut on a cul-de-sac, whether alley or street, by conveyances reserving a right of way to each purchaser, or a right in the purchasers to close the way, do not operate as dedication to public use, there having been no user by the public as such.[8]

§ 27. Sale of Lots by Recorded Map—Doctrine of Complete Dedication.—As the mere recording of a map on which streets and other public spaces are delineated, operates as an offer of dedication,[9] the rule, according to one line of cases, is that the sale of lots by a recorded map takes on, by an extension of the doctrine, a fresh and more emphatic significance, and amounts, in short, to a complete

6. People v. Sperry, 116 Cal. 593, 48 Pac. 723 (the sales in this case were accompanied by the declaration that the streets were not public streets); Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; opinion in department, 3 Cal. Unrep. 40.

7. People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474 (criticising San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, as overlooking this distinction, and saying that observations therein to the contrary of the rule here laid down are dicta).

8. Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac, 646; Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427. See supra, § 18, as to effect of sales by city of lots bounded by streets shown on official map.

9. See supra, § 25.

and irrevocable dedication, irrespective of further acceptance by the public.[10] "It is settled law that where one owning land lays off a town or village thereon, and makes a map of the town site showing it to be divided into streets, alleys, blocks, and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets to the use of the public."[11] Until actual acceptance, the owner holds the title to the dedicated land in trust for the public.[12]

§ 28. Complete Dedication as Dependent on Estoppel.—Cases saying that platting a tract of land, recording the plat, and selling lots with reference to it, constitute a dedication of the streets in favor of the purchasers, even though a dedication to the public is not perfected, state an incorrect legal principle, as there can be no dedication

10. Berton v. All Persons, 176 Cal. 610, 170 Pac. 151 (saying the acts amount to a "complete dedication or offer of dedication which was accepted by use of the public," and holding it immaterial that one deed described the way in question as a private alley); Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24 (holding evidence justified a finding of dedication); Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961 (in this case there was an indorsement on the map stating that it was unalterable); Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839 (a case of a public park in which the conflicting doctrines, the one here stated and the one subsequently set forth in § 31, seem to be asserted); San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Ferroggiaro v. Board of Public Works, 35 Cal. App. Dec. 23, 198 Pac. 810 (holding, however, that merely one sale is not enough to effect a dedication); Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692 (where lots were sold by number according to the map and not by metes and bounds); Daly City v. Holbrook, 39 Cal. App. 326, 178 Pac. 725; Davidson v. Griswold, 23 Cal. App. 188, 137 Pac. 619 (containing a very full discussion of previous decisions); Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

11. San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405.

12. Daly City v. Holbrook, 39 Cal. App. 326, 178 Pac. 725; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

except in favor of the public.[13] The sale by the map, or with reference to the streets upon it, is not merely for the consideration named in the deed, but for the further consideration that the streets and public grounds shown on the map shall be forever open to the purchaser.[14] The estoppel which such sales create against the owner and in favor of the purchasers is to deny that the streets are other than public ways, dedicated to public use; and this estoppel, therefore, in effect works a dedication to the public.[15] Purchasers of lots in a subdivision, by reference to its recorded map, have an interest in the retention as public streets of the entire scheme of thoroughfares as shown on the map, whether these lots actually border on the streets in question or not; and this interest may be sufficient to prevent revocation of the offer of dedication by the owner. But they could have no interest in the retention as a street of a cul-de-sac in a wholly unsold and unimproved block.[16]

§ 29. Doctrine of Incomplete Dedication.—But parallel with the authorities referred to in the two foregoing paragraphs is another line of decisions, not in harmony there-

13. Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178.

14. Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

15. Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915 (apparently regarding the estoppel as dependent upon actual user); Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961; People v. Langenour, 25 Cal. App. 44, 142 Pac. 888; Davidson v. Griswold, 23 Cal. App. 188, 137 Pac. 619; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498. See, however, Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686 (holding that an owner's estoppel to reclaim for himself a park in the retention of which private purchasers were interested would not prevent his revocation of the offer of its dedication to the public). See supra, § 18, as to effect of sale by city of lots bounded on street shown on official map. See infra, § 52, as to estoppel to claim or deny dedication. See infra, § 64, as to barring of rights of purchasers by adverse possession.

16. Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961. See infra, § 49, as to right of owner to revoke dedication with consent of purchasers or after having acquired their interest.

with, taking their rise from the later doctrine mentioned previously,[17] and holding that the sale of lots by a recorded map is, at most, only additional evidence of the intent to dedicate already shown by the recordation, and that public acceptance, either formal or by established public use, is necessary to a complete and irrevocable dedication.[18] The latest pronouncement of the supreme court is in support of this later doctrine. It is declared that there is a distinction between the rights accruing to the public generally, and those purchasing lots according to a map amounting to an offer of dedication.[19] And this decision of the supreme court might be thought decisive had not the court of appeals, in an even later opinion, reannounced the earlier rule.[20] Under the doctrine now being considered, whether the owner, by making sales according to a map of his subdivision, has offered to dedicate streets other than those on which the lots sold are bounded, is a fact to be determined from the circumstances of each case, such as the number of sales, their proximity to the street in question, the use to which the land has been put, the means by which, or the extent to which,

17. See supra, § 26.

18. Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915; City of Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. (N. S.) 378, 103 Pac. 914; City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; City of Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44; Griffiths v. Galindo, 86 Cal. 192, 24 Pac. 1025 (holding that a sale of lots and subsequent recording of the map before conveyances are made evidences a clear intent to dedicate streets, and that the fact that the conveyances describe the lots by lines carrying them to the center of the streets is immaterial); Inyo County v. Given, 183 Cal. 415, 191 Pac. 688.

19. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688 (criticising San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, as confusing the doctrine of dedication with other doctrines pertinent only to private interrelations growing out of sales, and declaring the contrary rule announced in that case to be mere dictum).

20. Ferroggiaro v. Board of Public Works, 35 Cal. App. Dec. 23, 198 Pac. 810, citing San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, as authority.

the streets have been brought into connection with other streets or highways.[1]

§ 30. Sufficiency of Map to Effect Dedication in General.—The word "park" written upon a map subdividing a tract of land is as significant of a dedication as is the word "street" written on such a map. The word carries with it the idea of an open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the town or city in which it is located. Its meaning is the same whether it be used alone, or with some qualifying term, such as "Central Park,"[2] although such terms are not so strong evidence of an intent to dedicate as the words "public park" would be.[3] Designating an open space upon a map of a town site as "court square" does not show an intention on the part of the land owner to dedicate it only to the county for a courthouse and other county buildings, and not to the municipality as a public square. Nor is such an inference strengthened by a deed from the land owner to the county of undescribed lands within the town site to be selected by the county, or a further deed of other property in obedience to the selection when made.[4]

1. Koshland v. Spring, 116 Cal. 689, 48 Pac. 58 (stating that the earlier doctrine of San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, has been thus modified); Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839 (but in which the doctrine stated supra, § 27, is also declared). See supra, § 18, as to effect of sale by city of lots bounded on street shown on official map.

2. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839.

3. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

4. San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405. See also County of Amador v. Gilbert, 133 Cal. 51, 65 Pac. 130, holding the designation of a plaza on the map of a town site sufficient to show its dedication within section 5 of the act of March 30, 1868 (Stats. 1867–68, p. 692), relating to town sites on public lands and providing that public squares, surveyed, marked and platted on the map should be dedicated by filing it. And see also San Francisco v. Bradbury, 92 Cal. 414, 28 Pac. 803, and Board of Education v. Donahue, 53 Cal. 190, where certain evidence is held to show that certain squares marked in color on the Van Ness map of

§ 31. In Case of Streets.—The dedication of land for streets by the making or adopting and recording of a map by the owner may take place whether or not the land is so designated on the map. Accordingly, if there is any space corresponding to a street on such a map which does not constitute any part of the platted blocks, it is necessarily dedicated to public use, whether it be lettered as a street or not.[5] And the delineation of a street on a map by parallel lines running through the blocks, is sufficient for purposes of dedication, though it is not named as a street.[6] This is true even though the space is not a prolongation of any existing street,[7] and even though it is so marked as to form a cul-de-sac.[8] And even where a strip of land dividing two tiers of lots in a subdivision is marked with a lot number, a dedication is shown where representations are made to purchasers of lots fronting on it that it is to be used as a street, and it is in fact improved, known and continuously used as a public way, to the knowledge of the owners of the tract.[9] The mere fact that the map is inaccurate as to the location of outside lands does not affect the dedication of the streets embraced by it.[10] However, a crude and imperfect map of blocks and streets, containing no names or designations of streets or lots, and not showing that it was made by

San Francisco were sufficiently designated as reserved to public use for school purposes or purposes of the fire department, so as to work a dedication.

5. London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

6. San Francisco v. Burr, 4 Cal. Unrep. 634, 36 Pac. 771; Bigley v. Nunan, 1 Cal. Unrep. 855.

7. San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482; Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961 (in which a street was subsequently laid out of which the strip in question would form a part).

8. City of Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. (N. S.) 378, 103 Pac. 914.

9. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658.

10. London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

anyone's authority, is too incomplete to amount to an offer of dedication.[11]

Platting land by stakes driven into the ground, thereby delineating lots and streets, has the same legal effect as mapping the subdivision on paper, though the streets are not named nor the lots numbered, as would be customary upon a paper map.[12] But such designation would, it seems, be an offer of dedication, nothing more.[13]

By User.

§ 32. In General.—By virtue of section 4468 of the Political Code, making the common law the rule of decision in California so far as it does not conflict with the constitution of the United States or with the constitution or laws of the state, the common-law rule as to the presumption of dedication by adverse user applies in California.[14] Where the public, or such portion of it as has occasion so to do, travel a road, with full knowledge of the land owners interested, without asking or receiving permission and without objection, for a period of time beyond that required to bar a right of action, a right in the public to the use of the road arises by implied dedication.[15] The term "prescription" is not strictly applicable to the right acquired by the public by the use of a way for any period of time.

11. City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439.

12. Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186.

13. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839.

14. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448. See COMMON LAW, vol. 5, p. 252.

15. People v. Myring, 144 Cal. 351, 77 Pac. 975; Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987 (opinion in bank. For opinion in department, see 7 Cal. Unrep. 15); People v. Power, 38 Cal. App. 181, 175 Pac. 803; Sherwood v. Ahart, 35 Cal. App. 84, 169 Pac. 240; Rice v. Boyd, 2 Cal. Unrep. 196 (saying user must be long enough to bar ejectment); United States v. Rindge, 208 Fed. 611. For note as to dedication of footways by permissive use, see 7 A. L. R. 125. For note as to implied dedication of land between street line and building, see note, 7 A. L. R. 727.

"The law allows prescriptions only to supply the place of grants, and inasmuch as the public cannot take by grant, the term 'prescription,' in its strict sense, has no application to highways. The true doctrine would seem to be that immemorial use by the public is evidence of a dedication, just as such use by an individual is evidence of a grant to him."[16]

There is nothing in the rule that adverse user by the public, for a period beyond that required to bar an action, establishes an implied dedication, which is in conflict with section 2621 of the Political Code, providing that no route of travel over private lands shall become a public road by use, or until so declared by public authority or by dedication by the owner.[17] While user, under the statute, cannot create a highway,[18] yet it may create the dedication of a highway.[19] Where the right of the public in a highway is acquired by user, the boundaries of the road are generally ascertained by reference to the user.[20]

It has been held that the dedication of lands on the banks of navigable waters for wharves or landings, cannot be presumed as a mere inference from a prescriptive user, but should be proved to have been made by writing or by public and unequivocal declaration or acts. Evidence of user is good only to show that the dedication was accepted and to explain other evidence or probabilities.[1]

§ 33. Duration of User.—There are general statements in some of the earlier cases to the effect that time is not a material element in creating a dedication,[2] and it is un-

16. Bolger v. Foss, 65 Cal. 250, 3 Pac. 871. See infra, § 34. See note in 7 Cal. Law Rev. 65.

17. Lantz v. City of Los Angeles, 185 Cal. 262, 196 Pac. 481.

18. Leverone v. Weakley, 155 Cal. 395, 101 Pac. 304; United States v. Rindge, 208 Fed. 611 (saying there must be a dedication or abandonment).

19. Leverone v. Weakley, 155 Cal. 395, 101 Pac. 304. See HIGHWAYS.

20. People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203.

1. California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936.

2. People v. Sperry, 116 Cal. 593, 48 Pac. 723; Harding v. Jasper, 14

doubtedly true that where there is an acceptance of an offer of dedication by use upon the part of the public, the dedication is complete. The actual consent and acquiescence of the owner in such use being established, the length of time of the public use ceases to be of importance. It is otherwise in the case of a use not referable to any offer of dedication upon the part of the owner. In such case a user by the public is ineffectual to establish a dedication short of the period of limitations.[3] At common law, the time of user necessary to create a presumption of dedication was not a fixed period but depended on the circumstances of the particular case.[4] But in California the statutory limitation of five years for commencing actions affecting title to realty, and for acquiring title by adverse possession or a prescriptive right to an easement, would by analogy be the period required to raise, through adverse user by the public, an undisputable presumption of dedication.[5] The courts have held sufficient, so far as the element of time is concerned, periods varying from five to forty years.[6] But of course a use of land as a public street for four or five months is too short.[7] The

Cal. 642; Hartley v. Vermillion, 7 Cal. Unrep. 15, 70 Pac. 273.

3. People v. Sperry, 116 Cal. 593, 48 Pac. 723; Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448. See supra, § 32.

4. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448; San Francisco v. Scott, 4 Cal. 114.

5. City of San Diego v. Hall, 180 Cal. 165, 179 Pac. 889; Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448.

6. Leverone v. Weakley, 155 Cal. 395, 101 Pac. 304 (fifteen years); People v. Myring, 144 Cal. 351, 77 Pac. 975 (twenty years); Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448 (thirty years); Bequette v. Patterson, 104 Cal. 282, 37 Pac. 917 (twelve or fourteen years); Plummer v. Sheldon, 94 Cal. 533, 29 Pac. 947 (five years); Patterson v. Munyan, 93 Cal. 128, 29 Pac. 250 (ten years); Babcock v. Welsh, 71 Cal. 400, 12 Pac. 337 (ten years); Rice v. Boyd, 2 Cal. Unrep. 196 (six years); Lantz v. City of Los Angeles, 185 Cal. 262, 196 Pac. 481 (fourteen years); Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421 (eighteen years); Merchant v. Grant, 26 Cal. App. 485, 147 Pac. 484 (twenty-two years); Barnes v. Daveck, 7 Cal. App. 487, 94 Pac. 779 (forty years).

7. San Francisco v. Scott, 4 Cal. 114.

fact that a patent was not issued to the owner of public lands for a number of years after public user of a strip as a highway began, would not affect the implied dedication, since under the act of congress of 1866, rights of way for highways were granted over public lands not reserved for public use, and the patentee would take subject to such easement.[8]

Effect of death of land owner.—It was early held that where the statute of limitations had commenced to run, its operation would not be suspended by the death of the person affected by its operation.[9] The same principle is applicable by analogy to a case of implied dedication, where the adverse use by the public had begun.[10]

§ 34. Statutory User for Five Years.—At one time in the history of California numerous special statutes, applicable to particular counties, declared that all roads used as such for five years, should become public highways. On January 1, 1873, section 2619 of the Political Code went into effect, by which a similar provision became applicable to the entire state; but by an act passed March 30, 1874, this clause was struck out of section 2619. Although the repealing act was by its terms confined to certain named counties only, it was held by the supreme court that it was effective as to the entire state.[11] But this decision, made in 1894, came too late to prevent an opposite construction from having been practically applied throughout the state,[12] until an unquestioned and practical repeal was effected in 1883, striking the entire section from the Political Code. "Whether such statutes be considered as creating or recognizing a rule of evidence, and

8. Bequette v. Patterson, 104 Cal. 282, 37 Pac. 917.

9. See LIMITATION OF ACTIONS.

10. Lantz v. City of Los Angeles, 185 Cal. 262, 196 Pac. 481.

11. Huffman v. Hall, 102 Cal. 26, 36 Pac. 417. See contra, Gloster v. Wade, 78 Cal. 407, 21 Pac. 6.

12. See dissenting opinion of Beatty, C. J., in Huffman v. Hall, 102 Cal. 26, 36 Pac. 417.

to declare that the public use for the named time shall be conclusive evidence of dedication, or rest on some other principle, their validity has not been doubted." And the right of the public to continue to use land as a highway is fixed by such statutes when the use has continued for the period named.[13] While the user in question has been spoken of as constituting a dedication,[14] it has been said such statutes were rather in the nature of a statute of limitations, which gave the public the right to a highway from mere user alone.[15] And the intent of the land owner was quite immaterial.[16]

§ 35. Character of User.—Where the dedication of a highway is sought to be established by user, it must be shown that the user was adverse, continuous and with the knowledge of the owner, for the required period of time.[17] The fact that public user of a road for a period beyond that necessary to bar an action, by which a presumption of dedication arises, was without the license or permission of the owner, does not conflict with the presumption, but is a necessary element in the acquirement of a right by the public by virtue of such user.[18] The use must be more than casual, and must, in the case of a road, be of a definitely delineated strip or way. The public habit of crossing private ground, without following any definitely marked way,[19] or the occasional and irregular travel across

13. Bolger v. Foss, 65 Cal. 250, 3 Pac. 871.

14. Southern Pac. Co. v. City of Pomona, 144 Cal. 339, 77 Pac. 929.

15. McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393; Bolger v. Foss, 65 Cal. 250, 3 Pac. 871.

16. Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840.

17. City of San Diego v. Hall, 180 Cal. 165, 179 Pac. 889 (saying that the use must be with the knowledge of the owner or with his consent, direct or implied); Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190. See infra, § 46, as to necessity that user, to constitute acceptance, be adverse.

18. Leverone v. Weakley, 155 Cal. 395, 101 Pac. 304. See infra, § 37, as to necessity that use shall not be under license.

19. City of San Diego v. Hall, 180 Cal. 165, 179 Pac. 889. See infra, § 39, as to user of entire

a ranch by land claimants and hunters, without more,[20] is insufficient to show a dedication by user. And the mere use of vacant land by the public for travel or public amusements is insufficient to show a dedication of it as a plaza.[1] But it is not always necessary for the public to make proclamation that they are using a road under a claim of right, or to show by some aggressively hostile act that the use is intended to be adverse to the owner. The adverse character of the use, and the knowledge and acquiescence of the owner, may be presumed from circumstances.

"Where prescriptive title to land is claimed it has been said that the hostile possession must be open and notorious and with intent to usurp the place of the true owner and put him out of possession; but the rule as to highways requires only such adverse use and occupation as is inconsistent with the owner's right to claim the exclusive use of the land, i. e., such adverse use as carries with it the assertion of an equal right by the public to use the highway."[2]

As land used for a highway cannot be inclosed or cultivated, and as no improvement of it by the public authorities is necessary to constitute it a highway, section 325 of the Code of Civil Procedure, prescribing the conditions necessary to an adverse possession of land is not applicable to the matter of highway acquisition by user. The statute applicable in section 2618 of the Political Code, declaring that public highways are, among others, such as are "dedicated or abandoned to the public." To accomplish this, neither improvement nor payment of taxes by the public is necessary.[3]

surface of tract as negativing intent to dedicate.

20. United States v. Rindge, 208 Fed. 611.

1. Latham v. City of Los Angeles, 87 Cal. 514, 25 Pac. 673.

2. Barnes v. Daveck, 7 Cal. App. 487, 94 Pac. 779.

3. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658.

§ 36. Knowledge and Consent of Owner.—Where it is claimed that dedication has been effected by acquiescence of the owner in the public use of his land as a highway, his knowledge of such use becomes an important and vital element since he cannot be held to have assented to what he did not know.[4] While user may be sufficient to show an acceptance by the public of an offer to dedicate, it is not sufficient of itself to establish dedication by the owner, except it appear clearly that the user was with his knowledge and consent, or without his objection.[5] Such knowledge and consent may be inferred from circumstances, however.[6] And, indeed, a long-continued adverse use establishes against the owner the conclusive presumption of knowledge and acquiescence, and at the same time it negatives the idea of a mere license.[7] Though town authorities by platting private property into lots and streets on the official map of the town cannot create any right in the public to the streets, yet if the streets are opened and used by the public an inference arises that this is done with the owner's consent; and the dedication is complete. But if the streets are not opened, or opened only in part, no such inference arises as to the unopened portion, and the further inference that the owner intends at some time to have the remainder opened up to public use, is insufficient to constitute a present offer of dedication.[8] Aside from the implication of knowledge just mentioned, it is well settled that knowledge of the agent is knowledge of the owner of land.[9]

4. Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421.

5. Demartini v. San Francisco, 107 Cal. 402, 40 Pac. 496; Huffman v. Hall, 102 Cal. 26, 36 Pac. 417; City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840; Hope v. Barnett, 78 Cal. 9, 20 Pac. 245.

6. Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421.

7. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448 (distinguishing Hope v. Barnett, 78 Cal. 9, as a case in which the period of user was too short to establish a prescriptive right); Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421.

8. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

9. Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421. See AGENCY, vol. 1, p. 846.

To avoid an implication of dedication, an owner should take some action in the way of asserting his claims. Such claims are sufficiently asserted within the rule where, after the passing of a municipal ordinance opening a street through private property, the owner declares that he will not surrender his rights till compensated, and afterwards re-enters on the land.[10]

§ 37. Intent in General.—While an intent to dedicate may be inferred from long acquiescence in a use by the public, a mere user by the public is insufficient to constitute a dedication of a highway when it is permissive merely or by virtue of a license.[11] Thus, where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land, will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate.[12] This is more particularly true where the use by the public is not over a definite and specified line, but extends over the entire surface of the tract, for it will not be presumed, from mere failure to object, that the owner of land so used intends to create in the public a right which would practically destroy his own right to use any part of the property.[13] So also mere travel by the public over a portion of uninclosed, waste land, in possession of squatters, and the title to which is in litigation, will not amount to a dedication as a highway by the owner.[14] And permissive use of a beach road which sometimes traverses private property, the use being scanty and infrequent and according to the custom

10. San Francisco v. Scott, 4 Cal. 114.

11. Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Demartini v. San Francisco, 107 Cal. 402, 40 Pac. 496; Cooper v. Monterey County, 104 Cal. 437, 38 Pac. 106; City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840.

12. City of San Diego v. Hall, 180 Cal. 165, 179 Pac. 889; F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 Pac. 62.

13. F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 Pac. 62. See supra, § 35, as to necessity that user should be of definite strip.

14. Harding v. Jasper, 14 Cal. 642.

of the country, is insufficient to establish an intent to dedicate a public highway, as against the private owner.[15]

§ 38. Use of Strip of Land Laid Out as Highway.—An intent to dedicate may, under certain circumstances, be inferred from long acquiescence in a public use of land along a definite and specified line.[16] Thus where a railroad company acquiesces in the opening of a street over its land, puts in crossings and danger signals, and in general treats it as a public street and consents to its use as such, a finding of dedication is warranted.[17]

Demarcation by owners.—A presumption of the dedication of a road arises where adjacent land owners lay out a road which is thereafter used by them and the public generally,[18] or where they voluntarily leave unfenced a strip of land for a public road, and the strip is so used by the public for more than five years without objection by them;[19] or where they petition for the laying out of a road, and grant a right of way therefor, and where the road built is continuously used by the public more than

15. People v. Rindge, 174 Cal. 743, 164 Pac. 633.

16. F. A. Hihn Co. v. Santa Cruz, 170 Cal. 436, 150 Pac. 62; Lantz v. City of Los Angeles, 185 Cal. 262, 196 Pac. 481, holding that continuous use by the public for fourteen years of a strip of land ten feet wide lying in the middle of a public street, without objection from the private owners, together with their failure to inclose or improve the strip or pay taxes on it, the only claim to it finally made being grounded on a tax title, creates a presumption of implied dedication. Compare San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127, holding that the fact that for eight years a strip of land was used by the public for travel, without either consent or objection on the owner's part, and that a house fronting on the strip so remained during the owner's possession, does not manifest an intent to dedicate the strip as a public street.

17. Southern Pac. Co. v. City of Pomona, 144 Cal. 339, 77 Pac. 929.

18. Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987.

19. Plummer v. Sheldon, 94 Cal. 533, 29 Pac. 947; Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421 (where the strip was also kept in repair by the public); Barnes v. Daveck, 7 Cal. App. 487, 94 Pac. 779.

five years.[20] By reservations, made in deeds by a common grantor, of a right of way between contiguous parcels of land, by the act of one grantee in opening and grading a roadway, and by public user of the roadway with the acquiescence of all the grantees, a dedication is effected to the extent of the user, though the reservations with deeds would alone be insufficient for this purpose.[1] But where a private right of way is fenced, and open to and used by others in passing to and from their properties, there is no dedication, but a mere license.[2]

§ 39. Fences and Gates.—The inclosure of land by a fence is strong evidence that any user of it by the public as a highway is permissive merely, and that there has been no dedication to public use.[3] The same is true where one maintained gates across a traveled way.[4] The placing of a gate across a roadway is not necessarily inconsistent with an intent to dedicate, however, and its effect is impaired by the fact that the road had previously been used for several years without interruption.[5]

§ 40. Implied Dedication in Favor of Public Utilities.—An extension of the law of implied dedication has been made by the California courts in favor of public utility

20. People v. Myring, 144 Cal. 351, 77 Pac. 975.

1. Taft v. Tarpey, 125 Cal. 376, 58 Pac. 24. See supra, § 21, as to dedication by reservations in deeds in general.

2. Silva v. Spangler, 5 Cal. Unrep. 277, 43 Pac. 617. See supra, § 22, as to delimiting road by fences as an act of dedication.

3. Huffman v. Hall, 102 Cal. 26, 36 Pac. 417.

4. Demartini v. San Francisco, 107 Cal. 402, 40 Pac. 496; Smithers v. Fitch, 82 Cal. 153, 22 Pac. 935; Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Hartley v. Vermillion, 7 Cal. Unrep. 15, 70 Pac. 273; Hibberd v. Mellville, 3 Cal. Unrep. 879, 33 Pac. 201, holding that where a line of travel over private land has been changed from time to time at the pleasure of the owner, and had been continuously barred by several gates, and had never been recognized as a road by public authorities, no intention to dedicate is manifested.

5. People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728.

companies as agencies, the principle being thus formulated:

"Where a person has suffered property belonging to him and under his control to be taken and devoted to a public use by one engaged in administering such use, and the matter has gone on so far that the beneficiaries thereof rely on its continuance and adjust their affairs accordingly, such owner having knowledge thereof and making no objection or protest, this conduct will be regarded by the courts as a dedication by such owner of the property to the particular public use, and he cannot thereafter interrupt nor prevent the same, his only remedy being to seek compensation for the property he has thus allowed to be taken."[6]

This principle has been announced and applied in a number of cases.[7] It seems that the application of the rule is conditioned on an original right in the land owner to prevent the appropriation of his property by legal means, and hence it is doubtful if it could apply against

6. Miller & Lux v. Enterprise C. etc. Co., 169 Cal. 415, 147 Pac. 567 (use of water of river for public purposes).

7. Haynes v. Indio Levee Dist., 46 Cal. App. 436, 189 Pac. 475; F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 Pac. 62 (use of land for railway right of way); Gurnsey v. Northern California Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906 (use of land for right of way for electric power line); Burr v. Maclay R. Water Co., 160 Cal. 268, 116 Pac. 715 (stating the general rule but holding that water not offered to the public generally, but used merely to fulfill the private contractual obligations of the appropriator, is not taken for public use); Barton v. Riverside Water Co., 155 Cal. 509, 23 L. R. A. (N. S.) 331, 101 Pac. 790 (use of subterranean waters for public purposes); Newport v. Temescal W. Co., 149 Cal. 531, 6 L. R. A. (N. S.) 1098, 87 Pac. 372 (use of subterranean waters for public purposes); Crescent Canal Co. v. Montgomery, 143 Cal. 248, 65 L. R. A. 940, 76 Pac. 1032 (right of way for irrigating canal); Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766 (use of subterranean waters for irrigation); Southern California Ry. Co. v. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352 (use of land for right of way of railroad); Fresno St. etc. Co. v. Southern Pacific R. Co., 135 Cal. 202, 67 Pac. 773 (use of land for right of way of railroad). For more specific applications of the doctrine, see RAILROADS, WATERS, and other special topics.

an upper riparian proprietor who cannot prevent the appropriation of water by a lower proprietor. Where water taken from a river by a canal company is used in irrigating thousands of acres of land occupied by a large number of persons, and in supplying water to a number of villages, such use is a public use, though water is supplied to some at more advantageous rates than to others.[8] The rule is less one of estoppel, than of general public policy.[9] And the principle underlying it is not based on any consideration of rights pertaining to the public service corporation itself, but solely upon considerations of public policy.[10]

Acceptance.

§ 41. **Necessity of Acceptance.**—In general, an acceptance by the public is absolutely indispensable to the validity of a dedication.[11] Until acceptance, the act or declaration of a land owner showing an intent to dedicate land to public use is a mere offer, and as such does not

8. Miller & Lux v. Enterprise C. etc. Co., 169 Cal. 415, 147 Pac. 567. See WATERS.

9. Gurnsey v. Northern California Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 65 L. R. A. 940, 76 Pac. 1032.

10. Gurnsey v. Northern California Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906.

11. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688; West Berkeley Land Co. v. Berkeley, 164 Cal. 406, 129 Pac. 281; City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Helm v. McClure, 107 Cal. 199, 40 Pac. 437; City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840; Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542 ("The doctrine upon this point is so well settled as to leave neither encouragement nor chance for discussion"); Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686; Spaulding v. Wesson, 5 Cal. Unrep. 399, 45 Pac. 807.

impose any burdens nor confer any rights.[12] Upon acceptance, however, the dedication becomes complete,[13] and the power of revocation is gone.[14] An important distinction is to be observed between a complete dedication and a mere offer to dedicate. In the case of a complete dedication no acceptance is required, it being presumed from the benefits arising from the dedication.[15] This will be true, even though there may not be imposed on the public, by such dedication, any obligation to make expenditures on the streets. And this possibility will not prevent the owner being as much concluded by his dedication in the one case as in the other.[16] A complete dedication in this connection has been said to be effected by a conveyance directly to a municipality, or to someone for the benefit of the public, or by filing a map showing words of dedication on its face,[17] but not by the mere filing of a map delineating a street.[18] Where a municipality dedicates land to itself for public purposes no acceptance is necessary;[19] nor is user by the public necessary to the acceptance of a street dedicated by a municipality out of pueblo lands, the municipality being both proprietor, and having authority to lay out, establish and accept streets which are offered to the public by way of dedication.[20]

12. City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Inyo County v. Given, 183 Cal. 415, 191 Pac. 688; Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421. See infra, §§ 48–50, as to revocation of offer of dedication.

13. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24; People v. Sperry, 116 Cal. 593, 48 Pac. 723; People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203; Harding v. Jasper, 14 Cal. 642; People v. Langenour, 25 Cal. App. 44, 142 Pac. 888.

14. See infra, § 48.

15. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

16. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839.

17. Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

18. Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692. See supra, § 25.

19. Harter v. San Jose, 141 Cal. 659, 75 Pac. 344.

20. Mills v. City of Los Angeles, 90 Cal. 522, 27 Pac. 354.

And under a statute declaring all streets including those "which shall hereafter be dedicated to public use" to be open, public streets, and within the power of the supervisors to grade and improve, a formal acceptance of a street so dedicated is not necessary to bring it within the statute and within the jurisdiction of the board.[1]

§ 42. Duty, Authority and Mode.—A municipality is not bound to accept an offer to dedicate a street,[2] but if it does so it must take the advantages yoked with the burdens.[3] The governing body of a municipality is the proper body to accept a dedication,[4] a tax assessor having no such authority.[5] While proof of acceptance must be unequivocal,[6] the acceptance may be manifested in many different ways.[7] It may be either actual or implied,[8] and is as effectual when made in one way as in the other.[9] It is actual where formal acceptance is made

1. Stone v. Brooks, 35 Cal. 489, construing Laws 1862, p. 391. See supra, § 17, as to acceptance by legislative act of offer of congress to dedicate highways over public lands. See supra, § 19, as to act of legislature confirming Van Ness Ordinance of San Francisco amounting to acceptance.

2. City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Partridge v. City of Richmond, 36 Cal. App. 389, 172 Pac. 166.

3. Partridge v. City of Richmond, 36 Cal. App. 389, 172 Pac. 166.

4. City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085.

5. Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961; Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686. See infra, § 52, as to assessment or payment of taxes as affecting right to claim or deny dedication.

6. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688.

7. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; People v. Langenour, 25 Cal. App. 44, 142 Pac. 888.

8. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692.

9. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; Berton v. All Persons, etc., 176 Cal. 610, 170 Pac. 151; Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915; West Berkeley Land Co. v. Berkeley, 164 Cal. 406, 129 Pac. 281 (holding that where formal acceptance has been had, user in addition is not necessary); People v. Myring, 144 Cal. 351, 77 Pac. 975; San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482; Helm v. McClure, 107 Cal.

by the proper authorities, and implied where a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication.[10] Acceptance shown by public user satisfies the requirements of section 2618 of the Political Code defining highways as those, among others, which have been dedicated to the public.[11] But where for a great many years there has been no acceptance by user of an offer to dedicate a street, during which period it has been barred from travel and valuable improvements constructed on it, it would seem that a direct and explicit acceptance by the municipality might well be demanded by a trial court before finding dedication as a fact. Certainly a finding of acceptance might well be refused from evidence of a general character simply justifying inferences looking in that direction.[12]

§ 43. **Time of Acceptance.**—Of course, there can be no acceptance of an offer of dedication before it is made or which has never been made.[13] Thus the act of a city in

199, 40 Pac. 437; Hall v. Kauffman, 106 Cal. 451, 39 Pac. 756; City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106 (user of an alley); Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; People v. Davidson, 79 Cal. 166, 21 Pac. 538; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; People v. Blake, 60 Cal. 497; San Francisco v. Canavan, 42 Cal. 541; Stone v. Brooks, 35 Cal. 489; Spaulding v. Wesson, 5 Cal. Unrep. 399, 45 Pac. 807; Los Angeles C. Assn. v. Los Angeles, 3 Cal. Unrep. 783, 32 Pac. 240 (user for four years); City of Eureka v. Croghan, 3 Cal. Unrep. 24, 19 Pac. 485; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

10. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839 (saying implied acceptance may be by user or adaptation for use, as by the improvement of a street).

11. Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421.

12. City of Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44.

13. City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235; Cook v.

putting a street on an official map cannot amount to an acceptance of an offer to dedicate it to public use, where the owner has made no such offer.[14] And a municipal ordinance accepting generally all streets previously dedicated has no application to a street delineated in an unrecorded map which a land owner expressly repudiated, and of which the city itself had no notice, the ordinance not having been passed in reliance on any representation of the owner.[15]

It is the rule that an acceptance of an offer of dedication must take place within a reasonable time after the offer was made.[16] What constitutes a reasonable time depends, of course, upon the circumstances of each case. It has been held, however, that a delay from two to four years was not,[17] but that a delay of nine years or longer was,[18] unreasonable. If the delay is too great, the owner may resume possession and thereby revoke his offer.[19]

Sudden, 94 Cal. 443, 29 Pac. 949; San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542 (an offer cannot be accepted before it is made).

14. Cook v. Sudden, 94 Cal. 443, 29 Pac. 949.

15. City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235.

16. Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692.

17. City of Eureka v. Gates, 137 Cal. 89, 69 Pac. 850 (delay a little over four years); Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085.

18. City of Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44 (forty years); City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855 (holding that the commencement of an action by a city to quiet title to a public plaza the offer to dedicate which was made twenty years before cannot be regarded as an acceptance of the offer); Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770 (nine years); People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474 (twenty years); Inyo County v. Given, 183 Cal. 415, 191 Pac. 688 (thirteen years); People v. Reed, 3 Cal. Unrep. 40, 20 Pac. 708 (holding that passing an ordinance twenty years after an offer to dedicate a street, directing its opening, is an insufficient acceptance of the offer).

19. Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692. See infra, § 48.

§ 44. Formal Acceptance—By Ordinance or Resolution. An ordinance accepting generally all streets and alleys, within the corporate limits of a municipality, which have been dedicated to public use, is a sufficient acceptance.[20] And where a conveyance, amounting to an offer to dedicate a street, is on record, it will be presumed that the common council were aware of it, and intended such an ordinance to apply to the street.[1] The act of public authorities in entering an order designating a street as a public highway and ordering it to be opened and obstructions removed, is an acceptance of a dedication.[2] And an ordinance declaring streets as shown on a map to be public streets is an acceptance of an offer of dedication made by making and recording the map and deeding in accordance with it, though the recordation did not take place till after the ordinance was passed.[3] Yet it has been held that an ordinance declaring a strip of privately owned land to be dedicated cannot be construed as an acceptance of an offer to which it does not refer.[4]

A statute empowering school trustees, when directed by vote of their district, to purchase, receive, hold and convey real and personal property, does not apply to dedications of land to public use for school purposes, so as to

20. City of Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. (N. S.) 378, 103 Pac. 914; City of Eureka v. Gates, 137 Cal. 89, 69 Pac. 850; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085 (holding that it is not necessary that the ordinance refer specifically to the street in question). See Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094, holding that a formal resolution of acceptance by a board of supervisors of an offer to dedicate a highway is evidence of acceptance, but is not the only evidence of such an act. And see People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203, holding the act of a board of supervisors in declaring a road over certain land a public highway, as petitioned for by the owner is evidence of an acceptance by the board.

1. City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085.

2. Griffiths v. Galindo, 86 Cal. 192, 24 Pac. 1025.

3. London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

4. People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474.

require a vote of the district before the trustees can make a valid acceptance of such a dedication.[5] And it is not necessary to render a dedicated strip of land a legal public highway that it be recorded as a road.[6]

§ 45. By Exercise of Jurisdiction.—Steps taken by public authorities to improve a street dedicated to public use, constitute an acceptance which perfects the right, and makes the street an open public highway for all purposes.[7] And so where public authorities assume jurisdiction over a street, change its name, acquire additional land with which to widen it, and enter upon and grade a considerable portion of it, their acts constitute an acceptance of any dedication of the street, or at least evidence of acceptance.[8] When an offer of dedication upon conditions is made, a performance of the conditions and public use of the land constitutes an acceptance. However, a condition that the land be graded at the city's expense means no more than that where the street is graded, it shall be at the city's expense, so that noncompliance with such condition upon request does not defeat the acceptance.[9] An order of the board of supervisors abandoning a street cannot be given effect as an acceptance of an offer of dedication.[10]

§ 46. By User.—To constitute an acceptance of an offer of dedication by user, it must appear that the use by the public was under a claim of right, and not by temporary license of the owner.[11] It must appear also that the user

5. Carpenteria School District v. Heath, 56 Cal. 478.

6. Blood v. Woods, 95 Cal. 78, 30 Pac. 129.

7. People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Stone v. Brooks, 35 Cal. 489.

8. Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094.

9. Los Angeles C. Assn. v. Los Angeles, 95 Cal. 420, 30 Pac. 523.

10. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688.

11. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693. See supra, §§ 35, 37, as to necessity that user, to create implied dedication, be adverse and not merely permissive.

is for the purpose intended and manifested by the owner in his offer,[12] and for the purpose which the land is fitted or intended to serve.[13] Thus the public use of a cul-de-sac ending in a creek, to take horses to water, and to reach the rear of a storeroom abutting on the alley, is a sufficient acceptance thereof.[14] But use of land for a highway or as a camping ground by strangers is not an acceptance of an offer to dedicate it as a public park, there being nothing done in the way of planting and maintaining shrubbery on the land and of keeping it as a park.[15] The fact that a street is situated in a sparsely settled suburban community is to be considered.[16]

§ 47. Duration and Extent of User — *Duration.*—As dedication is completed by the act of the owner, and acceptance, no particular time of user by the public would seem to be necessary to perfect the public's right.[17] Yet public user, to constitute an acceptance of an offer of dedication, must have continued a sufficient length of time clearly to show that the public have thus recognized the dedication, and used and accepted the property.[18] It

12. Helm v. McClure, 107 Cal. 199, 40 Pac. 437; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; People v. Davidson, 79 Cal. 166, 21 Pac. 538; People v. Blake, 60 Cal. 497; San Francisco v. Cananan, 42 Cal. 541; Harding v. Jasper, 14 Cal. 642; Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

13. Koshland v. Cherry, 13 Cal. App. 440, 110 Pac. 143.

14. Koshland v. Cherry, 13 Cal. App. 440, 110 Pac. 143.

15. Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

16. Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864.

17. Rice v. Boyd, 2 Cal. Unrep. 196. And see People v. Sperry, 116 Cal. 593, 48 Pac. 723 (saying that the actual consent and acquiescence of the owner in the public use being established, the length of time of the public use ceases to be of importance on the question of dedication). See supra, § 33.

18. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591 (requiring use for a reasonable time); Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692; People v. Langenour, 25 Cal. App. 44, 142 Pac. 888, holding that a continuous public user for twenty years of a roadway, delineated on a recorded map, is an acceptance of the offer of dedication.

must be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked, and the use by the public discontinued.[19]

Extent.—The acceptance by user of a portion of a road dedicated is an acceptance of it in its entirety.[20] This rule has been applied where a highway has a water ditch bordered by trees running lengthwise through its middle, and the public used but one side,[1] and where a portion of one side of a street was so obstructed by natural causes as to be inaccessible for ordinary travel, and the public used the remainder.[2] The extent to which the dedication of streets shown on the recorded map of a subdivision has been accepted by user, as to which they are affected by the rights of purchasers of lots not bounded on them, is to be determined by consideration of the circumstances of each case, such as the number of sales, their proximity to the streets in question, the use to which the land has been put, the means by which, or the extent to which, the streets have been brought into connection with other streets or highways.[3]

Revocation.

§ 48. Right and Authority in General.—An offer to dedicate may be revoked at any time before acceptance by

19. Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; San Francisco v. Canavan, 42 Cal. 541.

20. City of Santa Ana v. Santa Ana Val. Irr. Co., 163 Cal. 211, 124 Pac. 847; Southern Pac. Co. v. City of Pomona, 144 Cal. 339, 77 Pac. 929; People v. Langenour, 25 Cal. App. 44, 142 Pac. 888. But see, Logan v. Rose, 88 Cal. 263, 26 Pac. 106 (saying that it is an acceptance, at least to the extent of the user).

1. Southern Pacific R. R. Co. v. Ferris, 93 Cal. 263, 18 L. R. A. 510, 28 Pac. 828.

2. Bigley v. Nunan, 1 Cal. Unrep. 852.

3. Koshland v. Spring, 116 Cal. 689, 48 Pac. 58. See, however, Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094 (holding that the acceptance, by user or otherwise, of one or more particular streets or highways shown upon a recorded map will not operate as an acceptance of all or any other of the streets or highways delineated thereon).

the public,[4] in which event the offer becomes functus officio and cannot be revived by any acts of the municipality amounting to an acceptance.[5] And it has been said in this connection that it is immaterial whether the offer has been made by deed or otherwise.[6] The right of revocation is gone, however, if the offer is accepted before any attempt to exercise the right to revoke.[7] It seems, however, that

4. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178; People v. Dreher, 101 Cal. 271, 35 Pac. 867; Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; Phillips v. Day, 82 Cal. 24, 22 Pac. 976; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; People v. Williams, 64 Cal. 498, 2 Pac. 393; San Francisco v. Canavan, 42 Cal. 541; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692; Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498. See CONTRACTS, vol. 6, p. 51, as to analogous rule in regard to contracts.

5. Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

6. San Francisco v. Canavan, 42 Cal. 541. And see Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770 (holding that a conveyance of lots in a subdivided tract subject to the right of way of the public over such portion of the land granted as may fall within any road laid out over it does not preclude the grantee from revoking an offer to dedicate a road, never accepted by the public since, under the circumstances, the public had no right of way. But see Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686 (saying that a conveyance to a municipality, or to someone for the public, is a complete dedication, acceptance being unnecessary).

7. West Berkeley Land Co. v. Berkeley, 164 Cal. 406, 129 Pac. 281 (holding that after an offer of dedication, made by recording a map on which streets are delineated, has been formally accepted, the filing of a document declaring the map was filed merely for convenience and not as an offer of dedication, is ineffectual); People v. Sperry, 116 Cal. 593, 48 Pac. 723; Los Angeles Cem. Assn. v. Los Angeles, 95 Cal. 420, 30 Pac. 523 (holding that where an offer to dedicate a street on condition that the city grade it at its expense is accepted by entry and public user, the donor cannot revoke the dedication for failure to grade the street, until it becomes apparent, by declaration or otherwise, that the city will not grade this street at its expense); Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; People v. Hibernia Savings etc. Society, 84 Cal. 634, 24 Pac. 295; Brown v. Stark, 83 Cal. 636, 24 Pac.

the legislature may revoke even completed dedications of streets made by a municipality out of municipal lands, and may also delegate such power to the city, as it possesses competent power to vacate a street in a city.[8]

A revocation of an offer of dedication may be made by the owner, or by his successor in interest;[9] but not by a stranger to the title.[10] And under a statute authorizing a city to settle controversies relating to tide-lands granted and later dedicated in part by it as streets, the city may revoke such dedication as a feature of the desired settlement.[11]

§ 49. Estoppel in Favor of Private Persons.—If individuals have acted on an offer of dedication in such a manner that they would be injured by its revocation, it seems that the right to revoke cannot be exercised, even though there has been no public acceptance,[12] unless, in-

162; People v. Davidson, 79 Cal. 166, 21 Pac. 538; Stone v. Brook, 35 Cal. 489 (saying: "A dedication to public use is one thing, and the acceptance and actual opening of the street to public use, so that there can be no revocation, is quite another"); Rice v. Boyd, 2 Cal. Unrep. 196; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692; Hibberd v. Mellville, 3 Cal. Unrep. 879, 33 Pac. 201; Rice v. Boyd, 2 Cal. Unrep. 196; Bigley v. Nunan, 1 Cal. Unrep. 852; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498. See infra, § 62, as to effect of dedication on rights and powers of owner.

8. City of Oakland v. Oakland Water Front Co., 162 Cal. 675, 124 Pac. 251. But compare Breed v. Cunningham, 2 Cal. 361, holding that where the legislature has made a grant of public land as a street, the right or privilege so conveyed cannot be resumed by the state; and that a municipal corporation is bound by its act in dedicating a street to the public, and cannot afterwards deprive the public of the easement thus given. See HIGHWAYS.

9. Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915; Rice v. Boyd, 2 Cal. Unrep. 196.

10. Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864.

11. City of Oakland v. Oakland Water Front Co., 162 Cal. 675, 124 Pac. 251.

12. City of Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. (N. S.) 378, 103 Pac. 914; Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961; Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498. See supra, § 28, as to effect of estoppel in completing dedication. See infra, § 52, as to estoppel to claim or deny dedication.

deed, the persons in whose favor the estoppel operates consent to surrender their rights.[13] Purchasers from the owner, who have bought on the faith of the offer of dedication may claim this estoppel.[14] Thus it has been held that if the owner and subdivider of land sells lots according to a map on which streets are delineated, he may not revoke the offer of their dedication, except with the consent of his grantees, or after repurchasing the lots sold.[15]

§ 50. **Acts Constituting Revocation in General**—*By public authority.*—Article XV, section 2, of the constitution of 1879, providing that no individual, partnership or corporation claiming or possessing tide-lands, shall obstruct free navigation, does not operate to revoke the dedication of a public street along the waterfront of a city previously made by the legislature.[16] But condemning for street purposes former municipal lands, claimed to have been dedicated as streets by the municipality, levying and collecting taxes on them, receiving conveyances of them for street purposes, together with disclaimers of interest in them in various lawsuits, evince a revocation of such dedications.[17]

By private owner.—Revocation of an offer to dedicate made by a private owner may be evidenced by various acts inconsistent with the use for which the property was offered

13. Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

14. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

15. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839. But see Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686. And see Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141 (when the rights of purchasers were not allowed to prevent a revocation "so far as it affected the public"). See supra, §§ 25–31, as to effect of sale of lots by map as amounting to a completed dedication.

16. Pacific Gas Imp. Co. v. Ellert, 64 Fed. 421.

17. City of Oakland v. Oakland Water Front Co., 162 Cal. 675, 124 Pac. 251. See supra, § 48, as to authority of a city to revoke dedication made by it. See infra, § 51, as to effect of receiving conveyance in solido of land previously containing dedicated streets.

to the public.[18] Thus an offer is revoked by the act of the owner in retaining land in private possession and use,[19] or in resuming possession of the property,[20] or in placing obstructions on the land,[1] or in inclosing it with a fence,[2] or in inclosing and cultivating it.[3] On the other hand, however, the continued maintenance of fences which were in existence when the offer was made, is no evidence of a revocation.[4] Of course, a cultivation of the borders of a roadway by the purchasers of abutting property and not the original owners or dedicators is ineffectual as a revocation, especially where they make no claim of any right to do so.[5] The same is true as to obstructions made by persons other than the dedicator generally.[6]

Filing of map.—Where an offer of a dedication is made by map, the filing of a subsequent map delineating the land as private property, is a revocation of the previous offer.[7] This rule is equally true where the second map shows the dedicated area much reduced in size, the revocation in such case being, of course, pro tanto only.[8]

18. Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

19. People v. Reed, 3 Cal. Unrep. 40, 20 Pac. 708.

20. Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 Pac. 1094; People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692.

1. Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178.

2. Inyo County v. Given, 183 Cal. 415, 191 Pac. 688. See City of Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. (N. S.) 378, 103 Pac. 914, upholding a finding against a revocation, the evidence being conflicting.

3. Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770.

4. People v. Langenour, 25 Cal. App. 44, 142 Pac. 888.

5. People v. Langenour, 25 Cal. App. 44, 142 Pac. 888.

6. Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

7. San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482 (applying rule to dedication by municipality); Brook v. Horton, 68 Cal. 554, 10 Pac. 204 (revocation of dedication by municipality); Meyers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

8. Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915.

§ 51. Subsequent Conveyance.—An offer of dedication which has not been accepted is revoked by a subsequent deed of the property to a private grantee, without recognition of the easement,[9] unless, indeed, the purchaser has notice of some fact which would estop the grantor from revoking.[10] In such case it will be presumed that the grantee does not intend to keep the offer open unless he expressly indicates an intention to the contrary.[11] This rule is applicable where a platted tract is conveyed as a body without reference to the map.[12] So also making a contract for the sale to a private individual of land previously offered in dedication to the public, is strong evidence to show a revocation of the offer.[13]

Distinct from such a case is that in which the owner of a platted tract sells lots without referring to the street, such mention not being essential to the description.[14] And where the owner conveys to purchasers by deeds referring to the map filed, the fact that the exterior lines of the lots as described carry them to the center of the streets does not amount to a withdrawal of the offer of dedication.[15] Where a street in a newly opened tract is dedicated to public use, and the dedication accepted by public user, a subsequent conveyance of the unsold portion of the tract in a body cannot operate as a revocation of

9. Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44 (saying that such a conveyance is "some evidence" of an intent to revoke); Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 691; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; Meyers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686. See infra, § 55, as to subsequent conveyance negativing intent to dedicate. See infra, § 62, as to effect of subsequent conveyance by owner in general.

10. Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961. See supra, § 49.

11. Meyers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

12. City of Oakland v. Oakland Water Front Co., 162 Cal. 675, 124 Pac. 251; Griffiths v. Farlindo, 86 Cal. 192, 24 Pac. 1025; Phillips v. Day, 82 Cal. 24, 22 Pac. 976.

13. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

14. People v. Hibernia Savings etc. Society, 84 Cal. 634, 24 Pac. 295.

15. Griffiths v. Galindo, 86 Cal. 192, 24 Pac. 1025.

the dedication.[16] A conveyance of blocks of land in a platted tract which treats streets as having a potential character of a public way does not evince a design for a general revocation. And even a conveyance of a platted tract in solido may lose its significance as a revocation under certain circumstances.[17]

IV. ENFORCEMENT.

§ 52. Estoppel to Claim or Deny Dedication.—The public cannot be estopped to claim land dedicated to it by the fact that improvements have been made by a private individual in possession of it,[18] or by a purchase by a municipality of adjacent lands similarly dedicated.[19] So also the mere bringing of a condemnation suit by a city, does not estop it from claiming an implied dedication of the property, effectual prior to the commencement of the action.[20]

Effect of assessment and payment of taxes.—A tax assessor has no authority to accept a dedication,[1] and his act in assessing dedicated land to a private owner cannot affect the rights of the public in it, nor estop it from claiming the dedication.[2] Nor will the payment of the taxes

16. Brown v. Stark, 83 Cal. 636, 24 Pac. 162.

17. Koshland v. Spring, 116 Cal. 689, 48 Pac. 58, holding that a conveyance, by the owner of a tract as a whole by exterior bounds, to the assignee of one with whom he has contracted to subdivide, plat and sell it, but reserving certain blocks and parcels according to the recorded map, is not a revocation of the offer to dedicate the streets shown on the map, the description in the conveyance being similar to that in the original contract.

18. Humboldt County v. Van Duzer, 32 Cal. App. Dec. 924, 192 Pac. 192; Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864.

19. Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864.

20. Lantz v. City of Los Angeles, 185 Cal. 262, 196 Pac. 481. See supra, § 28, as to estoppel of owner by filing of map and sale of lots as completing dedication.

1. See supra, § 42, as to tax assessor having no authority to accept dedication.

2. Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961; Smith v. San

have that effect.[3] Similarly, a property owner cannot be concluded by the manner in which land has been assessed.[4] And the failure to levy taxes against a proposed street will not conclude him from claiming a revocation of an offer to dedicate it.[5]

§ 53. Procedure in General.—Ejectment may be maintained, in California, for the recovery by a city of the possession of a street dedicated to public use.[6] But whenever a dedication is claimed it must be pleaded.[7]

Findings.—A finding of dedication is a finding of an ultimate fact, as is also the finding that certain land is a public street. And when the court so finds it is immaterial whether the probative facts found tend to justify the former finding,[8] or are supported by the evidence.[9] A finding that a strip of land had not been dedicated and was not a highway is sufficient without special finding that it was not a continuation of a highway, and had not been

Luis Obispo, 95 Cal. 463, 30 Pac. 591; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405. For note as to necessity of acceptance to relieve dedicated street from taxation, see 5 A. L. R. 1537.

3. Lantz v. City of Los Angeles, 185 Cal. 262, 196 Pac. 481; Humboldt County v. Van Duzer, 32 Cal. App. Dec. 924, 192 Pac. 192; Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658 (saying that payment of taxes is not sufficient to rebut evidence of dedication otherwise sufficient); Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

4. Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154 (where land was assessed according to a recorded map authorized by the owner); Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686.

5. Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

6. San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127 (apparently overruling San Francisco v. Grote, 5 Cal. Unrep. 612, 36 L. R. A. 502, 47 Pac. 938, holding that ejectment will not lie when dedication is by user alone and the proof must rest in parol); Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433. See EJECTMENT.

7. F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 Pac. 62.

8. Ricks v. Lindsay, 3 Cal. Unrep. 578, 31 Pac. 262. See APPEAL AND ERROR, vol. 2, p. 1028; TRIAL.

9. City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247.

dedicated or abandoned to public use.[10] It is unnecessary to find who the owners were who dedicated a street, as against parties who have no interest in the premises.[11] As in other cases generally, findings of the jury will be sustained upon appeal if supported by any legal evidence.[12]

"While an acceptance of an offer to dedicate may be presumed or implied in many cases, yet a finding of fact that there never was an acceptance will rarely be set aside by an appellate court where such claim of acceptance is based upon presumption or implication alone."[13]

§ 54. **Evidence in General**—*Burden of proof.*—When it is claimed that land in possession of an individual has been dedicated to public use, it is incumbent upon the party so claiming, to show affirmatively that fact. This follows because of the rule that possession is prima facie evidence of title and is presumed rightful until the contrary appears.[14] So where city authorities undertake to remove trees, fences, or improvements from land on the assumption that it has been dedicated to public use, the burden is on them to prove the dedication.[15]

Weight and sufficiency.—As has been said, the courts will not lightly declare a dedication of land to public use, but will require that the intention of an owner to dedicate be proved clearly and unequivocally.[16] Where a dedication rests in acts and conduct, the intent must be manifested by clear and unmistakable acts.[17] However, stronger evidence is required of the dedication of a road

10. Smith v. Glenn, 6 Cal. Unrep. 519, 62 Pac. 180.

11. People v. Blake, 2 Cal. Unrep. 272, 3 Pac. 102.

12. Myers v. City of Oceanside, 7 Cal. App. 87, 83 Pac. 686. See APPEAL AND ERROR, vol. 2, p. 918.

13. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

14. Tate v. City of Sacramento, 50 Cal. 242. See EVIDENCE.

15. Hayward v. Manza, 70 Cal. 476, 13 Pac. 141.

16. See supra, § 13.

17. Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154.

in the country than of a street in a town or city.[18] Likewise, a stronger case must be made in proving a dedication of a neighborhood or timber road than of a thoroughfare.[19] In determining the quantum and kind of evidence necessary to show an intention to dedicate, the peculiar circumstances of the country must be taken into account. The general rule in California is the same as in England, but the facts which are held sufficient there might not always be so regarded here.[20]

§ 55. Evidence of Intent—Declarations.—Upon the issue of intent, it is permissible to prove the declarations of an owner in possession, when making a map relied on as showing the dedication of a highway,[1] his declarations that land constituted a part of a street,[2] and the declarations of the vendee when making the purchase that he intended to construct a public road.[3] In cases of a purchase by a corporation, evidence that its agents agreed with the vendor to dedicate a portion to public use as a highway is not objectionable as varying the written conveyance, but is admissible to show corporate intention to make the dedication, as there would be an inference that the subsequent act of the company in constructing the road was pursuant to such an agreement, if made.[4] To describe property as a street in a deed conveying it is evidence of an intent to dedicate.[5] And conversely a subsequent conveyance of the property to a private grantee

18. Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Harding v. Jasper, 14 Cal. 642.

19. Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746.

20. Harding v. Jasper, 14 Cal. 642.

1. Smith v. Glenn, 6 Cal. Unrep. 519, 62 Pac. 180. See EVIDENCE.

2. Santa Ana v. Santa Ana Val. Irr. Co., 163 Cal. 211, 124 Pac. 847; Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

3. People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728.

4. People v. Eel River etc. R. R. Co., 98 Cal. 665, 33 Pac. 728.

5. See People v. Blake, 60 Cal. 497 (where evidence of recitals in deeds, and declarations of predecessors in the chain of title, coupled with user by the public for a time, was held sufficient to show a dedication, two justices dissenting).

strongly tends to negative such intent.[6] A judgment secured by the owner of a lot land fronting it to be a private way is admissible in subsequent litigation with other parties to show that he never consented to the use of the street as a public highway.[7] So also a petition by a land owner asking that a road over his land be declared a public highway is evidence of an intent to dedicate it to public use,[8] although a petition by him for indemnification for land used by the public is not an admission of its dedication, but rather the reverse. Indeed, favorable action by a city on the latter petition would be an admission by it that the land was not then public property.[9] Evidence of the number of persons who use a way over private land is immaterial on the question of the owner's intention.[10]

Declarations of former owners.—Under section 1849 of the Code of Civil Procedure, declaring that the act, declaration or omission of a grantor, while holding title, is admissible in evidence against his own and subsequent grantees, evidence of declarations of a predecessor in the chain of title, tending to show a dedication of a portion of the property to public use is admissible against a subsequent owner.[11] Accordingly, a map made and recorded at the request of one who, it is claimed, made a dedication, is admissible against his grantees on that issue.[12]

6. City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693. See supra, § 51.

7. Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646.

8. People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203. See also People v. Myring, 144 Cal. 351, 77 Pac. 975, holding that a petition for the laying out of a highway in the vicinity of one actually built, and a grant of way therefor, signed by a land owner, are admissible on the issue of dedication, the substantial identity of the route being for the jury.

9. Latham v. City of Los Angeles, 87 Cal. 514, 25 Pac. 673. See infra, § 58.

10. Hibberd v. Mellville, 3 Cal. Unrep. 879, 33 Pac. 201.

11. People v. Blake, 60 Cal. 497.

12. City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247. See infra, § 57.

§ 56. Testimony of Owner or Agent.—The testimony of an alleged dedicator as to his intent in the matter of dedication, is relevant but not conclusive. But the rule admitting such testimony should be limited to cases where the acts done by him do not manifestly indicate an intent to dedicate.[13] No weight should be given to declarations of an intent contrary to that plainly shown by acts done long before. And where a land owner's acts are inconsistent with anything but an intent to dedicate, he cannot destroy their effect by subsequent declarations that he did not mean to be bound by the necessary import of his conduct.[14] So the unaided testimony of an owner that he did not intend to dedicate a street, given many years later, cannot be taken as against the dedication implied from his deed describing land as bounding on the street.[15]

Testimony of agent.—It is not competent for an agent to testify that his principal intended a dedication to public use, where there is nothing to show that he knew what his principal's intention was.[16] But testimony of the directors of a corporation, who were acting in its behalf at the time a road was constructed by the company, that it was the company's intention when purchasing the land to dedicate it as a public road, is admissible.[17]

§ 57. Maps as Evidence.—Maps and plats are frequently admitted in evidence in cases involving dedication. When made by the dedicator they are admissible against him and his grantees.[18] When made by others, they may be admitted, in a proper case, as tending to show a general knowledge of the existence of the street or alley, and perhaps for other purposes.[19] The latter, however, even

13. Helm v. McClure, 107 Cal. 199, 40 Pac. 437.

14. City of Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. (N. S.) 378, 103 Pac. 914.

15. Eureka v. Gates, 137 Cal. 89, 69 Pac. 850.

16. California etc. Co. v. Union etc. Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936.

17. People v. Eel River R. R. Co., 98 Cal. 665, 33 Pac. 728.

18. See infra, § 55.

19. Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106, holding that while the map in question was ad-

though they be official, are not conclusive and do not preclude evidence to negative a dedication.[20] Where a recorded map is relied on as showing an intent to dedicate a street, the situation of the strip of land in connection with the contiguous blocks, the conduct of the parties when the map was made or adopted, the recording of it and acting upon it, and references made to it in subsequent conveyances, are all to be weighed and considered, and the court has the undoubted right to draw inferences therefrom.[1]

Evidence of instructions of a land owner given to his surveyor for the preparation of the map of a subdivision is hearsay, and inadmissible on the issue of the dedication of streets shown thereon.[2] And filed field-notes and memoranda of a surveyor used in preparing a map alleged to show a dedication, and from which he freely testifies, are properly excluded from evidence.[3] Likewise, evidence of the bounds of lands outside those of a street as shown on a recorded map, contained in patents or other instruments, is inadmissible to vary the dedication made by the map.[4]

§ 58. Evidence of User, Acceptance and Revocation.— The use made of a highway, and the extent of the use, may be proved for the purpose of showing that it has been

missible to show general knowledge, it did not tend to prove an official acceptance of an alley.

20. Whelan v. Boyd, 93 Cal. 500, 29 Pac. 69.

1. London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237. See Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646 (evidence held to sustain a finding of no dedication, the owner having empowered the grantees to close the way, and the use having been permissive only); People v. Sperry, 116 Cal. 593, 48 Pac. 723 (evidence held to sustain a finding of no dedication, the owner having declared the ways delineated were private ways only). See also, Smith v. Glenn, 6 Cal. Unrep. 519, 62 Pac. 180, holding evidence so conflicting as to support a finding of no dedication, despite filing of map.

2. City of Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. (N. S.) 378, 103 Pac. 914. But see Smith v. Glenn, 6 Cal. Unrep. 519, 62 Pac. 180 (holding declarations of an owner while having a map made admissible to show intent).

3. Smith v. Glenn, 6 Cal. Unrep. 519, 62 Pac. 180.

4. London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

dedicated to public use.[5] But public user of a highway cannot be proven by evidence of the declarations of third persons, nor by hearsay evidence.[6] The mere fact that land in private ownership is marked on an official map of a city, as a public street is not conclusive on the question of acceptance.[7] And the fact that a street delineated on a map was never formally accepted and never opened or used supports the presumption that it was never even impliedly accepted, and that the land had reverted to the owner.[8] A potent fact tending to negative the acceptance of an offer to dedicate a street is found in the payment by the municipality of large sums of money to the owner for the privilege of entry on and use of the land.[9]

The manner in which highways, laid out in a subdivision and offered in dedication to the public, connect with adjacent public highways is irrelevant on the issue of revocation of the offer of dedication.[10] But an allegation in a complaint by a city in a quiet title suit that the owner claims adversely to the city, indicates a prior revocation of any offer of dedication. And in the absence of proof of an acceptance a court or jury would be justified by such allegation in finding there was no dedication.[11]

§ 59. Questions of Law and Fact.—Dedication is a question of fact, which the jury is to decide from the circumstances of each particular case.[12] While it would seem that where the facts are undisputed their legal effect

5. Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106.

6. Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106.

7. See supra, § 57.

8. Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692.

9. Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44.

10. Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770.

11. City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855. See City of Oakland v. Oakland Water Front Co., 162 Cal. 675, 124 Pac. 251, holding that the fact that a city, in litigation concerning former municipal lands, disclaims all interest in them, is strong evidence of the revocation of dedications of streets previously made or attempted to be made by it out of the lands.

12. Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; Sussman v. San Luis Obispo County, 126 Cal. 536, 59 Pac. 24;

is for the court, as in other cases,[13] it has been said that in all cases where it is claimed that a dedication in pais is created, no amount of evidence will justify the court in instructing a jury that dedication is conclusively shown.[14] The animus dedicandi is a question of fact,[15] and can never be a question of law.[16]

V. OPERATION AND EFFECT.

§ 60. In General.—Where land is dedicated to public use, the public takes it in trust for the public purpose designated.[17] And where streets or squares in a city are dedicated, the use does not vest in the city, nor in its inhabitants, but in the public,[18] although the state itself has no proprietary interest in them.[19]

Helm v. McClure, 107 Cal. 199, 40 Pac. 537; People v. Dreher, 101 Cal. 271, 35 Pac. 867; People v. Davidson, 79 Cal. 166, 21 Pac. 538; Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Harding v. Jasper, 14 Cal. 642; Mulch v. Nagle, 34 Cal. App. Dec. 639, 197 Pac. 421; Hartley v. Vermillion, 7 Cal. Unrep. 15, 70 Pac. 273; Smith v. Glenn, 6 Cal. Unrep. 519, 62 Pac. 180; Hibberd v. Mellville, 3 Cal. Unrep. 877, 33 Pac. 201; United States v. Rindge, 208 Fed. 611. See TRIAL.

Dedication is an ultimate fact, dependent upon the establishment of other facts, and is to be found from the evidence presented to the court. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; People v. Langenour, 25 Cal. App. 44, 142 Pac. 888. See supra, § 53.

13. People v. Langenour, 25 Cal. App. 44, 142 Pac. 888.

14. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

15. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Meyers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686; Hartley v. Vermillion, 7 Cal. Unrep. 15, 70 Pac. 273.

16. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

17. Harter v. San Jose, 141 Cal. 659, 75 Pac. 344.

18. Hoadley v. San Francisco, 50 Cal. 265. See Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591 (saying that a street is a highway for the use and benefit of the public at large though under the immediate care of the municipality); and see Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799, where the court speaking of land reserved under the Van Ness ordinance says: "The proprietary interest in all such property belongs to the public, and whether the legal title to such property be in the municipality or any of its officers or departments, it is at all times held by it or them for the benefit of the whole public, and without any real proprietary interest therein."

19. San Francisco v. Spring Valley W. W., 48 Cal. 493.

§ 61. Title and Rights Acquired by Public.—It is not essential to a dedication that title should pass from the owner.[20] Indeed, as a rule, the public takes nothing but an easement, the fee title and right of entry remaining in the original owner.[1] This rule has been crystallized in the statute providing that "By taking or accepting land for a highway, the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same."[2] In other words, the easement or right which the public acquires by the establishment of a highway is the right to travel over it, and the only control which public authorities can exercise over the highway is such as is necessary to maintain it in a proper and convenient manner for the public use.[3] They have the right of exclusive possession, a right to disturb the soil, a right to grade and improve the street in various ways.[4] And for such purposes the municipality acquires a right of entry, which is a legal, and not merely an equitable right.[5] It cannot, however, make an entry for purposes not incidental to the effective use by the public of the highway, or authorize anyone else to do so. For example, it has no right to drill a well on a highway, even for the purpose

20. Carpenteria School District v. Heath, 56 Cal. 478; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

1. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906 (dedication of highway); Wright v. Austin, 143 Cal. 236, 101 Am. St. Rep. 97, 69 L. R. A. 949, 76 Pac. 1023 (dedication of highway); Harter v. San Jose, 141 Cal. 659, 75 Pac. 344; San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542 (dedication for free public dock); Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692 (dedication of highway); Rice v. Boyd, 2 Cal. Unrep. 196. See San Leandro v. La Breton, 72 Cal. 170, 13 Pac. 405, holding that where a land owner plats a town site, with streets, public squares, etc., the title to the property thus dedicated remains in him, prior to the incorporation of the town, in trust for the public. See, however, supra, § 19, for instance of dedication by passing of title. See "EASEMENTS."

2. Pol. Code, § 2631.

3. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906.

4. San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127.

5. Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433.

of sprinkling it,[6] or authorize a power company to place poles and string wires for the general transmission of electricity for commercial purposes.[7]

§ 62. Title and Rights of Dedicator.—The right to public use, conferred by dedication, is paramount to the title of the owner of the soil.[8] By dedication, the owner abandons the land to the public for the use to which he has subjected it. And, upon acceptance by the public, his power to interfere with the use is gone as effectually as if he had transferred the title by grant.[9] He cannot qualify the dedication by any subsequent act or declaration.[10] For instance, he cannot afterwards so sell or dispose of the land as to alter or defeat the dedication.[11] And any mortgages executed by him are taken subject to the public's rights.[12] Similarly, a vendor who holds a mortgage on the land for the unpaid purchase money, and who accepts a reconveyance in satisfaction of it, takes the property subject to a dedication to public use of certain streets made by the vendee while holding title, though had he foreclosed his mortgage he would have taken the property free from the dedication.[13] Neither a dedicator or those claiming under him can assert any ownership inconsistent with the public use.[14] Indeed, they are estopped to deny title in themselves at the time. And any title subsequently acquired "feeds the estoppel."[15]

6. Wright v. Austin, 143 Cal. 236, 101 Am. St. Rep. 97, 65 L. R. A. 949, 76 Pac. 1023.

7. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906.

8. Rice v. Boyd, 2 Cal. Unrep. 196.

9. Rice v. Boyd, 2 Cal. Unrep. 196.

10. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839.

11. Breed v. Cunningham, 2 Cal. 361. See supra, § 51, as to revocation by subsequent conveyance.

12. Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

13. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839.

14. Harding v. Jasper, 14 Cal. 642; Hibberd v. Mellville, 3 Cal. Unrep. 879, 33 Pac. 201.

15. City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247; Rice v. Boyd, 2 Cal. Unrep. 196.

Inasmuch as the fee remains in the owner, however, he may exercise all the prerogatives of ownership which are not inconsistent with the public use.[16] Thus, it has been said that, subject to the right of the public, the owner may take trees growing upon the land, occupy mines, and sink watercourses under it.[17] He may also enjoin a misuser of the highway[18] or may recover damages therefor,[19] and the fact that a lot owner's grantor dedicated the street in front of the lot to public use does not estop him from claiming damages from the city from the grading of the street, the acceptance of the offer of dedication carrying the burdens as well as the benefits.[20]

§ 63. Partial, Conditional and Qualified Dedication.— Generally, where land is dedicated to the public for a highway, the entire width of the strip is dedicated, and the owner has no right to maintain trees or other obstructions or encroachments on it. But a dedication may be so worded that the public does not acquire an unlimited right to use all the surface between the sidelines for public purposes. There may be a part of it excepted, and reserved to the owner, in which case the public gets the right of way burdened with the reservations or lessened by the exceptions contained in the dedication. Thus a reservation in a deed granting land to a county for a road, of trees growing on the land, is valid, and the public authori-

16. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906; Wright v. Austin, 143 Cal. 236, 101 Am. St. Rep. 97, 65 L. R. A. 949, 76 Pac. 1023. See supra, § 61.

17. Wright v. Austin, 143 Cal. 236, 240, 101 Am. St. Rep. 97, 65 L. R. A. 949, 76 Pac. 1023, quoting from Jackson v. Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263, and from Woodruff v. Neal, 28 Conn. 167.

18. Wright v. Austin, 143 Cal. 236, 101 Am. St. Rep. 97, 65 L. R. A. 949, 76 Pac. 1023.

19. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906.

20. Partridge v. City of Richmond, 36 Cal. App. 389, 172 Pac. 166. See supra, § 67, as to right of owner to claim rights in soil of highway.

ties cannot interfere with the trees, though otherwise they would constitute a nuisance.[1] And a statute dedicating tide-lands within a city as public grounds, providing that nothing therein should prevent the construction of wharves or the free use of the lands for fishing, dedicates the lands subject to the paramount rights of navigation and fishery.[2] When a street, partly covered by navigable waters, is dedicated to public use by act of the legislature, it becomes a public street, to its fullest extent, subject, in that portion of it covered by navigable water, to the control and regulation of the state.[3] While a right of way for the maintenance of a ditch along a strip of land afterwards dedicated to public use as a street is not affected by the dedication if its owner does not join therein, this would not carry with it the right to build a new and larger ditch along a different line.[4] And an unrecorded agreement between an owner of land and another cannot operate to restrict the purposes for which a park is dedicated by delineation on the recorded map, as against the rights of purchasers buying without notice, on the faith of the map.[5]

§ 64. Alienation by Public.—Lands dedicated to public use are effectually withdrawn from commerce, while the use continues, and the right of the public in them cannot be alienated, or conveyed to any private person.[6] The rule is the same whether the land was originally municipal or private property.[7] Thus, while a municipal ordinance

1. Hill v. City of Oxnard (Cal. App.), 189 Pac. 825. See supra, § 47. For note as to validity of condition of dedication that remaining property shall not be subject to assessment for improvements, see 16 A. L. R. 499.

2. Santa Cruz v. Southern Pac. R. R. Co., 163 Cal. 538, 126 Pac. 262, construing Stats. 1871–72, p. 472.

3. People v. Williams, 64 Cal. 498, 2 Pac. 393.

4. Kern Island etc. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. 1052.

5. Caulfield v. Berwick, 27 Cal. App. 493, 150 Pac. 646.

6. Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; Hoadley v. San Francisco, 50 Cal. 265.

7. Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433.

dedicating land to public use remains in force, the city cannot effect a legal sale of the land to private persons.[8] Nor can the property be sold under execution against the city.[9] Likewise, as has been seen in another article in this work,[10] it is an elementary principle in California, that no title or right to land dedicated to public use can be acquired by adverse possession.[11] The rule is the same whether the legal title resides in the state at large, or a municipality, or in some official department of the city, or other official body.[12] And it is not affected by nonuser by the public.[13] The mere fact that a county may devote to other purposes land purchased for a hospital, or may even sell the land as prescribed by statute, does not enable one in adverse possession of a portion to claim title in that way, on the theory that the land is not dedicated to public use, but is held in analogy to private property.[14] But it seems that adverse possession may be relied on to defeat a claim of a municipality to control a

8. McCracken v. City of San Francisco, 16 Cal. 591 (interpreted in San Francisco v. Calderwood, 31 Cal. 587, 91 Am. Dec. 542, as meaning that the city could not convey a perfect title). See supra, § 62, as to effect of subsequent conveyance by original owner.

9. Hart v. Burnett, 15 Cal. 530.

10. See ADVERSE POSSESSION, vol. 1, pp. 497, 502.

11. Humboldt County v. Van Duzer, 32 Cal. App. Dec. 924, 192 Pac. 192; Kern Island etc. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. 1052; Hoadley v. San Francisco, 70 Cal. 320, 12 Pac. 125; Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; People v. Pope, 53 Cal. 437; Hoadley v. San Francisco, 50 Cal. 265; Rice v. Boyd, 2 Cal. Unrep. 196 (holding that while the public use continues, neither the right of the owner of dedicated land to the soil nor that of the public to the use is affected by the statute of limitations); Daly City v. Holbrook, 38 Cal. App. 326, 178 Pac. 725; Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864; Davidow v. Griswold, 23 Cal. App. 188, 137 Pac. 619; Koshland v. Cherry, 13 Cal. App. 440, 110 Pac. 143; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

12. San Francisco v. Bradbury, 92 Cal. 414, 28 Pac. 803; Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799. See ADVERSE POSSESSION, vol. 1, p. 503, note 1.

13. Humboldt County v. Van Duzer, 32 Cal. App. Dec. 924, 192 Pac. 192.

14. County of Yolo v. Barney, 79 Cal. 375, 12 Am. St. Rep. 152, 21 Pac. 833.

street the offer to dedicate which was never accepted.[15] And it has been held that adverse possession, while not affecting the public, will bar the right of private persons who have purchased lots abutting on streets delineated on a map made by the owner of the tract.[16]

§ 65. Use and Diversion.—Property dedicated becomes public property, impressed with the use for which it was dedicated, and the public cannot divert it from that use,[17] at least, without the consent of the dedicator or his successor in interest.[18] A dedication made by a private individual for a specific public use, is to be strictly construed as to the use intended. But this rule does not apply to public lands dedicated by the municipality itself. In such case a more liberal construction in favor of subsequent uses by the city is proper.[19] It seems that land dedicated to public use by a city, the dedication being confirmed by act of the legislature, may be diverted to other purposes than those of the original dedication, by the concurrent act of the city and legislature, no private rights having intervened.[20] When, however, dedicated land is situated within a municipality, but is set aside and reserved by the state for certain purposes, the municipality has no right to divert the property from such purposes. But the right of the state to do so is unlimited, unless there are contract restrictions, or private rights of an abutting owner or other person are involved.[1]

15. Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141.

16. Phillips v. Day, 82 Cal. 24, 22 Pac. 976.

17. Harter v. San Jose, 141 Cal. 659, 75 Pac. 344 (holding, however, that the park in question was dedicated by the act of the legislature and the city was empowered by its charter to lease portions of it for certain purposes); Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Mahoney v. Board of Education, 12 Cal. App. 293, 107 Pac. 584. See supra, §§ 8, 61.

18. Mahoney v. Board of Education, 12 Cal. App. 293, 107 Pac. 584.

19. Spires v. City of Los Angeles, 150 Cal. 64, 11 Ann. Cas. 465, 87 Pac. 1026.

20. Harter v. San Jose, 141 Cal. 659, 75 Pac. 344.

1. Mahoney v. Board of Education, 12 Cal. App. 293, 107 Pac. 584.

Streets.—The dedication of a street to public use authorizes any ordinary use for street purposes, including the use for street-car tracks.[2] It seems that a change in the location of a dedicated street may be made by the owner with the acquiescence of the public authorities.[3]

Parks and squares.—The installation of tennis courts, croquet grounds, and children's playgrounds within the confines of a public park is not a deviation from the uses to which it was dedicated as a park.[4] Under the rule of liberal construction applicable in the case of a dedication by a municipality itself, a dedication of pueblo lands "as a public place forever for the enjoyment of the community in general" is sufficiently broad to allow of the erection of a public library building in the park so dedicated, but not of a building devoted in part to the general administrative business of the city.[5] Pueblo land formerly dedicated as a public square does not lose its character and become a public street merely because the use made of it by the public is that of a public street. Formal official and authoritative action would be necessary to effect the change.[6]

§ 66. Delay in User—Abandonment.—The effect of dedication to public use, once completed, cannot be impaired so

2. Finch v. Riverside etc. Ry. Co., 87 Cal. 597, 25 Pac. 765. See Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227, holding that a limited and temporary deposit of part of a load on the top of a hill to enable the teamster to bring up the remainder and then reload for further carriage, is not an invasion of the rights of the owner of the fee who has dedicated a highway to public use, but is in furtherance of the purposes for which the public has an easement.

3. Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498. See also supra, § 61.

4. Caulfield v. Berwick, 27 Cal. App. 493, 150 Pac. 646. See note in 3 Cal. Law Review, 66, and in 18 A. L. R. 1246.

5. Spires v. City of Los Angeles, 150 Cal. 64, 11 Ann. Cas. 465, 87 Pac. 1026.

6. Cohn v. Parcels, 72 Cal. 367, 14 Pac. 26.

as to authorize the dedicator to resume possession, by any delay in the use of the land for the purpose for which it was set apart.[7] The public can appropriate the land to the purpose for which it was dedicated whenever convenience or necessity may suggest.[8]

Abandonment.—The public may abandon or discontinue a highway dedicated to public use.[9] Municipal lands dedicated to street purposes may be vacated and the dedication relinquished by act of the legislature.[10] It is well settled, however, that the rights of the public in a dedicated street cannot be lost by nonuser, or by a mere temporary abandonment of the use,[11] and the mere fact that only a portion of a strip of land dedicated as a highway is used does not show an abandonment of the unused portion, the user of a part being an acceptance of the whole.[12] The adoption of an official map of a city, showing a line drawn across the mouth of a street previously dedicated and accepted as a public street, is not sufficient to divest the public of its rights.[13] The paramount right of the public

7. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864; Grogan v. Town of Hayward, 4 Fed. 161, 6 Sawy. 498.

8. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237.

9. San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482. See ABANDONMENT, vol. 1, p. 1.

10. Brook v. Horton, 68 Cal. 554, 10 Pac. 204.

11. Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864. See ABANDONMENT, vol. 1, p. 5. See, however, Ferroggiaro v. Board of Public Works, 35 Cal. App. Dec. 23, 198 Pac. 810, holding that under section 2620 of the Political Code, in force till its repeal in 1883, a five-year period of nonuser constituted an abandonment of a dedicated street.

12. Santa Ana v. Santa Ana, Val. Irr. Co., 163 Cal. 211, 124 Pac. 847; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237 (holding that the fact that only a portion of a dedicated street is used for a number of years does not divest or impair the right of the public to open up and use the remainder of the street whenever the exigencies of public travel require). See supra, § 47.

13. City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085. See HIGHWAYS as to abandonment of highways.

to the use of dedicated land continues until the public relinquishes the land or discontinues the use.[14] But when the public use to which land is dedicated ceases, the dedication is at an end,[15] and the land reverts to the owner.[16]

14. Rice v. Boyd, 2 Cal. Unrep. 196.

15. San Francisco v. Canavan, 42 Cal. 541.

16. Rice v. Boyd, 2 Cal. Unrep. 196.

(C. M.)

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I. INTRODUCTORY.

Scope of Article—Definition—Elements.

§ 1. Scope of Article.—This treatment of the subject of deeds deals with the instrument in its ordinary accepted meaning as an instrument conveying real property. The article covers in general the various forms of a deed, its requisites, validity and effect, including the execution, operation, construction, the estates or interests created, exceptions and reservations from the conveyance, and conditions and restrictions imposed. It does not, however, treat particularly of the nature and characteristics of the different kinds of estates, or of the phraseology necessary to create them.[1] Other kinds of conveyances,[2] and conveyances by particular classes of persons, and persons in

1. See ESTATES; LIFE ESTATES; REMAINDERS; REVERSIONS.

2. See ASSIGNMENTS FOR BENEFIT OF CREDITORS; MORTGAGES; TRUST DEEDS.

particular relations,[3] are treated in other articles. Certain matters relating to deeds, but not exclusively, and treated under other titles are the acknowledgment or proof of deeds for record,[4] the effect of recordation as notice,[5] the cancellation and reformation of deeds,[6] the forgery of deeds,[7] the establishment of lost deeds,[8] the delivery of deeds in escrow,[9] tax deeds,[10] and grants of land by the government.[11] While the article deals with the incidents and appurtenances generally which are deemed to pass to the grantee upon a conveyance,[12] the principles relating to fixtures are discussed in a separate article of this work.[13]

§ 2. **Definition.**—The term "deed" may be used in a generic sense,[14] and at common law was defined as "a writing sealed and delivered by the parties."[15] But in this article it is considered in its more usual and limited sense as a written instrument conveying title to real property.[16] As thus used, it has a more restricted meaning than the term "grant,"[17] "transfer"[18] or "conveyance."[19] A deed is an executed con-

3. See EXECUTORS AND ADMINISTRATORS; FRAUDULENT CONVEYANCES; GUARDIAN AND WARD; HUSBAND AND WIFE; RECEIVERS; SHERIFFS AND CONSTABLES.

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12. See infra, § 151 et seq.

13. See FIXTURES.

14. Hellman v. Howard, 44 Cal. 100.

15. Barr v. Schroeder, 32 Cal. 609; Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209 (citing 2 Bl. Com. 295).

16. Hellman v. Howard, 44 Cal. 100; Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209.

17. Civ. Code, § 1053; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; McFarland v. Walker, 40 Cal. App. 1508, 181 Pac. 248.

18. Civ. Code, §§ 1039, 1053; Scholle v. Finnell, 173 Cal. 372, 159 Pac. 1179; Estate of Peabody, 154 Cal. 173, 97 Pac. 184. Compare Estate of Spreckels, 5 Cof. Prob. Dec. 311, in which it is said that "transfer" applies in California to the transmission of title to real property, and is of equivalent signification and effect to "grant."

19. Civ. Code, § 1215; Stewart v. Powers, 98 Cal. 514, 33 Pac. 486;

veyance.[20] It is not merely evidence of a grant but it is the grant itself.[1] It is also an executed contract—the words of conveyance being its operative words[2]—subject to all rules of law concerning contracts in general,[3] except that a consideration is not necessary to its validity.[4] Hence, to become effective a deed requires a meeting of the minds of the parties.[5] Though a deed conveying title to land no longer requires a seal as essential to its validity,[6] it is a more formal instrument than a simple contract; its execution and delivery are deemed to be among the most solemn of civil acts.[7]

§ 3. Formal Components—Property Right in Deed.—The ancient and formal or orderly parts of a deed[8] have, in modern times, largely yielded to intention. The inclination of courts at the present day is to regard the whole deed without reference to formal divisions.[9] And the code furnishes a simple form of grant without such

In re McConnell, 74 Cal. 218, 15 Pac. 746; Ingoldsby v. Juan, 12 Cal. 564 (construing "conveyances" as used in statute of conveyances, act of April 16, 1850, Wood's Digest, p. 104).

20. Duckworth v. Watsonville Water etc. Co., 170 Cal. 425, 150 Pac. 58; President etc. of Bowdoin College v. Merritt, 75 Fed. 480.

1. Hamilton v. Hubbard, 134 Cal. 603, 66 Pac. 860.

2. Rhine v. Ellen, 36 Cal. 362.

3. Civ. Code, §§ 1040, 1066; Johnson v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047; Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Pulliam v. Bennett, 55 Cal. 368; Kimball v. Semple, 25 Cal. 440; McFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248; Sherriff v. Sherriff, 32 Cal. App. 681, 163 Pac. 878; Whitcomb v. Worthing, 30 Cal. App. 629, 159 Pac. 613; East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634; Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935; Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896.

4. See infra, § 37.

5. McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948. See infra, § 50.

6. See infra, § 17.

7. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398.

8. 8 R. C. L. 923.

9. Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935. See infra, §§ 12, 125.

formal divisions.[10] Accordingly, the omission of all or any of the formal parts of a deed does not destroy its validity, where enough appears on its face to show that those having an interest intend to convey it, it being sufficient if the matter written is legally set forth in an orderly manner by words, which clearly specify the agreement and meaning of the parties, and bind them.[11] The habendum clause, the office of which is to limit and define the estate conveyed,[12] although usually made a separate portion of the deed, is not necessarily so, and may be wholly omitted,[13] the estate or interest granted being defined or limited in the premises or granting part of the deed.[14] But a statute which provided that every conveyance should pass all the estate of the grantor unless the intent to pass a less estate should appear,[15] was held as not intended to prohibit the use of the habendum clause.[16]

Property right in deed.—It is a provision of the code that "Instruments essential to the title of real property, and which are not kept in a public office as a record, pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title."[17]

10. Civ. Code, § 1092, reads: "A grant of an estate in real property may be made in substance as follows: 'I, A B, grant to C D all that real property situated in (insert name of county) county, state of California, bounded (or described) as follows: (Here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by that name, as, for instance, 'The Norris Ranch').

"'Witness my hand this (insert day) day of (insert month), 19—.

"'A B.'"

11. Roberts v. Abbott, 32 Cal. App. Dec. 1026, 192 Pac. 345 (citing 8 R. C. L. 935); Meyers v. Farquharson, 46 Cal. 190.

12. Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Montgomery v. Sturdivant, 41 Cal. 290; Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896. See infra, § 125.

13. See Civ. Code, § 1092, quoted supra.

14. Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Montgomery v. Sturdivant, 41 Cal. 290.

15. Laws 1855, § 2, p. 171; and compare Civ. Code, § 1105.

16. Montgomery v. Sturdivant, 41 Cal. 290.

17. Civ. Code, § 994.

Modes and Forms of Conveyance.

§ 4. In General.—A voluntary transfer of title or any interest in real property can be made only by written instrument, as by deed, by force of the statute of frauds.[18] And the same rule obtained under the early statute of conveyances.[19] Under the ancient common law, transfers of land were made by feoffment and livery of seisin. These consisted of a formal delivery of possession on the premises, symbolized by the manual delivery of a clod or piece of turf from the land, all of which was done in the presence of witnesses from the vicinage. The publicity was required because in those times there were no public records of conveyances and it was necessary in some way to preserve evidence of the transfer. For this reason the ceremony was required and the presence of witnesses was necessary.[20] It was only where the actual possession and the right of property were in different persons that a transfer of the estate, as distinguished from a transfer of the possession could be made.[1] But it is from the Statute of Uses (Henry VIII) that the lease and release,[2] the grant and the bargain and sale, as modes of conveyance, were derived. Prior to that statute a bargain and sale could not pass title, but if supported by a proper consideration it could be enforced in a court of equity as an agreement to convey. Since the statute the use is executed into a legal estate, and the necessity of resorting to equity is obviated.[3] The Statute of Uses, however, is not a part of the common law constituting the rule of decision in the state of California under the provisions of the

18. Civ. Code, § 1091; Code Civ. Proc., § 1971; and see FRAUDS, STATUTE OF.

19. Act of April 16, 1850, Wood's Digest, p. 104; Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209.

20. Tennant v. John Tennant M. Home, 167 Cal. 750, 140 Pac. 242.

1. Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

2. See infra, § 6.

3. Chandler v. Chandler, 55 Cal. 267; Mesick v. Sunderland, 6 Cal. 297. See generally, 8 R. C. L. 925.

code.[4] It has never been in terms adopted in this state;[5] and it is doubtful, to say the least, if it was ever in force here.[6] Nevertheless, the early California statute of conveyances was held to render a deed as effectual for every purpose to pass title or right of the grantor, as it would have been under the Statute of Uses, and irrespective of the fact of possession of the grantor or grantee.[7] Delivery of possession of the property transferred is not required;[8] and the transfer is valid though the property is in the adverse possession of another.[9] How far the rules governing voluntary conveyances by deed are modified by principles affecting transfers by operation of law is not within the scope of this article.[10] It does not appear that the form of deeds known as indentures or mutual deeds have ever been in use in California; the deed poll, a deed executed by the grantor only, being in universal use.[11]

§ 5. Covenants to Stand Seized.—A covenant to stand seized of premises to the use of a grantee was a peculiar species of conveyance at common law operating to pass title by force of the Statute of Uses. Before the statute, like a bargain and sale deed,[12] it had no force as a conveyance, but was regarded as an executory contract, and the party was forced to rely upon his covenant or resort to a court of chancery for relief.[13] The peculiarity of this method of conveyance, aside from the consideration on which it was founded, turned on its operation and effect

4. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Pol. Code, § 4468.

5. Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

6. Chandler v. Chandler, 55 Cal. 267; Mesick v. Sunderland, 6 Cal. 297.

7. Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

8. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661. See, also, § 91, infra.

9. Civ. Code, § 1047.

10. See ESTOPPEL; ADVERSE POSSESSION; FRAUDS, STATUTE OF.

11. 8 R. C. L. 925.

12. See supra, § 4.

13. Chandler v. Chandler, 55 Cal. 267; Mesick v. Sunderland, 6 Cal. 297.

to create estates in future.[14] And to sustain deeds, otherwise void under the law as it stood prior to the code as attempting to create a future estate,[15] the doctrine has been advanced and discussed in California cases. While the courts recognize that such deeds cannot be supported as conveyances by treating them as covenants to stand seized, except by virtue of the Statute of Uses, it has been held that even though that statute has never been adopted as a part of the California law,[16] a court of equity would treat the transaction as a contract, and if supported by a proper consideration, enforce it as it would have done prior to the statute, and thus effectuate the intention of the parties.[17] Both before and after the statute a bargain and sale could only be supported by a pecuniary consideration, while a covenant to stand seized required a consideration of blood or marriage.[18] And where neither of these species of considerations are present, it follows that equity cannot give relief.[19] As indicated above, there is no occasion for the application of these principles to deeds executed subsequent to the adoption of the code which authorizes the creation of a freehold to commence at a future day without the intervention or termination of a precedent estate.[20]

§ 6. Quitclaim Deed—Indorsed Assignment.—A quitclaim deed is closely related to a simple release,[1] but has come to be recognized as a distinct form of conveyance, and operates like any other deed to the extent of transferring whatever title or interest the grantor has, but none

14. 8 Ruling Case Law, 1121.
15. See infra, § 147.
16. See supra, § 4.
17. Chandler v. Chandler, 55 Cal. 267; Mesick v. Sunderland, 6 Cal. 297.
18. Peck v. Vandenberg, 30 Cal. 11; and see cases cited supra.
19. Chandler v. Chandler, 55 Cal. 267; Hawes v. Stebbins, 49 Cal. 369 (while the decision is not placed upon this ground, it is the only ground, in view of Chandler v. Chandler, supra, upon which it appears the decision can be sustained).
20. See infra, §§ 147–149.
1. 8 R. C. L. 926.

other.[2] This is especially true where words of grant are used.[3] Hence, the word "grant" itself, when used in its generic and not in its technical sense, includes a quitclaim deed.[4] At common law a deed of release or quitclaim never operated as a conveyance in a technical sense unless the party taking it was in possession of the land, and then the deed operated to enlarge the estate.[5] The operative words usually employed in a quitclaim deed are "remise, release and quitclaim,"[6] but no specific words are essential if the language sufficiently shows an intent to quitclaim.[7] Thus, the words "remise" may be omitted;[8] and a conveyance of the "right, title and interest" of the grantor, without covenants of title, is a mere deed of quitclaim.[9] So, a deed of release and quitclaim may be framed in words of agreement, as where one "covenants and agrees to give up" all his right, title and interest in the property.[10]

Indorsed assignment.—An assignment indorsed upon the back of a deed, stating that the grantee has "conveyed all his interest in the within instrument" is not a conveyance, and at most passes only the equitable title.[11]

Distinctions.

§ 7. Deed and Executory Contract.—In determining whether an instrument is a conveyance or an agreement to

2. See infra, § 88.

3. Muller v. Boggs, 25 Cal. 175; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108.

4. Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; McFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

5. 8 R. C. L. 1024.

6. Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108.

7. See note, 105 Am. St. Rep. 855; and see note, 3 A. L. R. 945, as to test of conveyance as quitclaim or otherwise.

8. Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112; McFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

9. O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

10. Thompson v. McKay, 41 Cal. 221.

11. Dupont v. Wertheman, 10 Cal. 354.

convey, the first rule is to ascertain whether the language imports a present conveyance or contemplates a further assurance to pass the title.[12] Thus an instrument reciting that one party "has this day sold," etc., with a stipulation, upon full payment of the consideration, to give a general warranty deed, was held not to be a present conveyance, but an executory contract.[13] But an instrument has been held to be a deed, though it was drawn in the form of an agreement and had indorsed thereon the words "agreement for a deed."[14] On the other hand, the fact that the parties designated an instrument as an "agreement," and all signed it, has been held to clearly indicate an intention that it should be something other than a deed, particularly where it recognized a right remaining in the owner to make a sale of the premises.[15] A sale of water for irrigation purposes has been held to be an executory contract, and not a grant to be recorded in the book of deeds.[16] The distinction is further illustrated by a conveyance on condition precedent, in which case the instrument is a deed although the title does not vest in the grantee until the performance of the condition, whereas if the contract were executory it would be necessary to execute a deed of conveyance to ultimately pass the title.[17]

§ 8. Lease—Mortgage—Bond.—Though a lease for a term exceeding one year,[18] and a mortgage, are in a sense conveyances,[19] they are not deeds, for the reason that they do not convey title. Thus a mortgage under the code is restricted to purposes of security and carries

12. Roberts v. Abbott, 32 Cal. App. Dec. 1026, 192 Pac. 345 (citing 8 R. C. L. 929).

13. Ellis v. Jeans, 7 Cal. 409.

14. Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112.

15. Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543.

16. Stanislaus Water Co. v. Bachman, 152 Cal. 716, 15 L. R. A. (N. S.) 359, 93 Pac. 858.

17. Brannan v. Mesick, 10 Cal. 95, 1 Lab. 24. See infra, § 196.

18. Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130.

19. Civ. Code, § 1215 (terming them conveyances within the recording provisions).

no title or estate in the property.[20] While in case of a lease only the use of the premises is generally transferred.[1] The tenant generally takes possession, and the lease takes effect before the rent is paid, and this circumstance is a very strong one to show the intention of the parties.[2] A bond for a warranty deed to be given upon payment of the purchase price of certain lands, and reciting that "whereas I have this day sold," etc., does not convey title.[3]

§ 9. **Will Generally.**—The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and per contra no rights have accrued to and no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument.[4] It then ceases to be ambulatory, it acquires a fixed status and operates as a conveyance of title.[5] Furthermore, a will is not delivered.[6] It is fundamental, on the other hand, that, while possession or enjoyment of an estate may be deferred, a deed to be

20. Code Civ. Proc., § 744. A similar statutory provision existed prior to the code; see Practice Act, § 260; and see generally, MORTGAGES.

1. The distinction is observed in the following cases, the instrument involved in each instance being construed as a grant and not a lease: Payne v. Neuval, 155 Cal. 46, 99 Pac. 476; Mann v. Mann, 141 Cal. 323, 74 Pac. 995. See, also, San Pedro etc. R. R. Co. v. Hamilton, 161 Cal. 610, 37 L. R. A. (N. S.) 686, 119 Pac. 1073, where it was held that the word "grant" as used in article XV, section 3, of the constitution, did not include the meaning of "lease." See LANDLORD AND TENANT.

2. Ellis v. Jeans, 7 Cal. 409.

3. Wilson v. Truebody, 1 Cal. Unrep. 238 (holding that a deed by the purchaser purporting to convey his interest under the bond conveyed no title).

4. See WILLS.

5. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089.

6. In re Hall's Estate, 149 Cal. 143, 84 Pac. 839. Compare infra, § 48 et seq.

operative must pass a present interest.[7] Accordingly, if an instrument passes at the time of its execution a present interest or title in property, although it may be only a future estate and may be subject to defeat on the happening or nonoccurrence of a future event, it is a present conveyance and not a will.[8] It is sometimes stated as a distinguishing characteristic that a will is revocable and a deed is irrevocable.[9] But the quality of being irrevocable as applied to a deed only refers to the nature of the instrument as a deed, and not to express provisions it may contain touching its revocability.[10] The law does not permit a testamentary or post mortem disposition of property to be made by deed.[11]

§ 10. Principles Distinguishing Will Applied.—Under the rule permitting the creation of future estates by deed,[12] an instrument in the form of a deed granting and transferring property in praesenti is a deed and not a will, notwithstanding it reserves the enjoyment until the death of the grantor;[13] "for though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the

7. McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 104 Am. St. Rep. 84, 1 L. R. A. (N. S.) 315, 79 Pac. 447. See infra, § 84.

8. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242 (quoted in Burkett v. Doty, 32 Cal. App. 337); President of Bowdoin College v. Merritt, 75 Fed. 480. See ESCROW.

9. Estate of Hall, 149 Cal. 143, 84 Pac. 839; Kenney v. Parks, 6 Cal. Unrep. 111, 54 Pac. 251.

10. See infra, § 192.

11. Hunt v. Wicht, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639; Cox v. Schmarr, 172 Cal. 371, 156 Pac. 509; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Estate of Hall, 149 Cal. 143, 84 Pac. 839; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736.

12. See infra, §§ 148, 149.

13. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Estate of Hall, 149 Cal. 143, 84 Pac. 839; Nichols v. Emery, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089; President etc. of Bowdoin College v. Merritt, 75 Fed. 480. See, also, infra, § 70.

postponement is in such case produced by the express terms, and does not result from the nature of the instrument.''[14] Hence, where an instrument purported to be ''signed, sealed and delivered,'' it was construed to be a deed, though it contained the provision that it was to remain null and void during the grantor's lifetime and become of full force and effect immediately upon his decease without court process of any kind.[15] But a deed in trust ''to take effect only upon the death'' of a certain one of the trustors, and purporting to convey all the property that the trustors might have and own at the time of his death, was held to be testamentary in character and not a deed.[16] Even the reservation in a deed of the power to revoke it may not destroy or restrict its effect as a present conveyance, or make it in any degree testamentary in character.[17] The same principle applies to the reservation to the grantor of a power of sale. Where the instrument constitutes a present conveyance of a future vested interest such reservations merely afford the means whereby the future estate can be defeated and divested before it ripens into an estate in possession. And the circumstance that the disposition of the property thus made is substantially the same as might have been made by will is not material. The principle is equally applicable whether the conveyance does or does not create a trust.[18]

14. Estate of Hall, 149 Cal. 143, 84 Pac. 839 (quoting 1 Jarman on Wills, p. 18).

15. Estate of Hall, 149 Cal. 143, 84 Pac. 839.

16. Niccolls v. Niccolls, 168 Cal. 444, 143 Pac. 712 ("While it is competent to create a trust which shall take effect after the death of a grantor, nevertheless there must be some interest or estate which passes at the time of execution of the deed").

17. See infra, § 192; Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Nichols v. Emery, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089; President etc. of Bowdoin College v. Merritt, 75 Fed. 480 (evidence that the grantor often spoke of such instrument as her will is not admissible to destroy its character as a deed).

18. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242.

§ 11. Intention as Affecting Distinctions.—The legal effect of an instrument executed and delivered as a deed is not altered by the fact that one object of the transaction was to save the expense and trouble of administration upon the grantor's estate.[19] There is manifest in such a declared purpose, not only an absence of testamentary intent, but an absolute hostility to such intent.[20] Nor does the fact that the grantor was on his deathbed and executed the deed in view of that fact raise the implication that the instrument was intended as a last will and testament.[1] Neither does the fact that the conveyance was intended for the grantee's support in case of the grantor's death,[2] or that it was made dependent upon the verbal promise of the grantees to pay certain sums in the nature of gifts to third parties after his death,[3] make the transfer testamentary in character.[4]

II. FORMAL REQUISITES.

§ 12. In General.—The word "executed," when used with reference to a conveyance, technically comprehends both its signing and delivery.[5] And while the word is frequently used to express the act of subscribing or signing alone,[6] it is to be given its technical meaning unless

19. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17. Compare infra, § 64.

20. Nichols v. Emery, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089.

1. Carty v. Connolly, 91 Cal. 15, 27 Pac. 599.

2. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471.

3. Ellis v. Funk, 32 Cal. App. 426, 163 Pac. 332.

4. See generally, WILLS.

5. Code Civ. Proc., § 1933, reads: "The execution of an instrument is the subscribing and delivering it, with or without affixing a seal." Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Worthley v. Worthley, 33 Cal. App. 473, 165 Pac. 714 (holding that a finding that plaintiff "executed" a deed was inconsistent with a finding that it was not intended to be delivered until the grantor's last sickness); Elliott v. Merchants' B. & T. Co., 21 Cal. App. 536, 132 Pac. 280.

6. Elliott v. Merchants' Bank etc. Co., 21 Cal. App. 536, 132 Pac. 280

the context indicates that it was used in this narrower and popular sense.[7] Consequently the "execution" of a deed imports the completion of all acts necessary to give it full operation and effect.[8] By express code provision a deed is sufficient in California if it contains in substance the names of the parties,[9] and a description of the property,[10] with sufficient words of conveyance,[11] the particular quantity of interest conveyed, when not shown by the deed, being supplied by presumption.[12] Nothing more was required by the civil law under the Mexican regime,[13] although there is a conflict in the earlier cases.[14] To these requisites may, if desired, be added conditions, reservations, and covenants.[15] Matters concerning the form of the body of the instrument,[16] the substantive requisites of consideration,[17] parties,[18] description of property conveyed,[19] estates and interests created or reserved,[20] and delivery and acceptance,[1] are considered in other subdivisions of this article. The courts seek to effectuate the intention of the parties irrespective of mere formalities,[2] and if the instrument purports to, and was intended to convey land, it is to be presumed that, knowing the law, they undertook to conform to it, and to execute such an instrument as would be effectual for the purpose intended.[3] Hence, if an instrument purports to be a deed,

(holding that the word "executed" was used in this limited sense in the findings of the trial court).

7. Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054 (applied to a mortgage).

8. See infra, § 51.

9. See infra, § 27.

10. See infra, § 155.

11. Civ. Code, § 1092. See Mesick v. Sunderland, 6 Cal. 297, stating the rule prior to the code.

12. Civ. Code, § 1105. And see infra, § 137.

13. Schmitt v. Giovanari, 43 Cal. 617; De Merle v. Mathews, 26 Cal. 455 (reviewing Hayes v. Bona, 7 Cal. 154; Stafford v. Lick, 10 Cal. 16; Stanley v. Green, 12 Cal. 166; Havens v. Dale, 18 Cal. 366).

14. See cases cited in preceding note.

15. See infra, § 88.

16. See supra, § 3.

17. See infra, § 37 et seq.

18. See infra, § 20 et seq.

19. See infra, § 155 et seq.

20. See infra, divisions VIII, X and XI.

1. See infra, § 48 et seq.

2. See infra, § 119.

3. Burton v. Le Roy, 5 Sawy. 510, Fed. Cas. No. 2217.

contains language ordinarily used in deeds, by its terms passes a present interest in the property therein described, and was executed, acknowledged and delivered as a deed, it is a deed.[4] So, if it be clear that one intended to convey the title to real property by an instrument designated as an agreement or a bill of sale, the law will, if possible, so construe the words used as to effectuate that intent.[5]

§ 13. Words of Conveyance, Generally.—The words of conveyance in a deed are its operative words and constitute the contract itself.[6] It is characteristic of a deed that it operates immediately to pass the title;[7] and the words used must be apt and proper for that purpose,[8] although no precise form of words is necessary.[9] Whether an instrument contains operative words of grant, or only exhibits an intent or purpose which is not carried into present effect must depend upon the construction of the whole instrument.[10] Any words indicating an intention to transfer the estate, interest or claims of the grantor are sufficient, whether, or not, they are such as were generally used in a deed of feoffment, bargain and sale, or release.[11] Where a deed after conveying a life estate, and after the description, declared that "it is the purpose of the grantor that after the death of the grantee the said described lands shall become and be the property of," etc., it was held that this was but an expression of the grantor's purpose in the future disposition of the prop-

4. President etc. of Bowdoin College v. Merritt, 75 Fed. 480.

5. Meyers v. Farquharson, 46 Cal. 190.

6. Rhine v. Ellen, 36 Cal. 362.

7. McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 104 Am. St. Rep. 84, 1 L. R. A. (N. S.) 315, 79 Pac. 447. See infra, § 84.

8. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; Dupont v. Wertheman, 10 Cal. 354.

9. Meyers v. Farquharson, 46 Cal. 190; Civ. Code, § 1092. See supra, § 3.

10. East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634.

11. Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

erty, that it contained no operative words of grant and therefore conveyed no present interest.[12]

§ 14. Grant, Bargain, Sell, Convey.—The word "grant" is expressly designated by the code as a word of conveyance.[13] While it was originally applied only to incorporeal hereditaments to denote a transfer by deed of that which could not be passed by livery of seisin,[14] it has now become a generic term applicable to the transfers of all classes of real property.[15] In fact, the distinction of the ancient common law probably never obtained in this country.[16] Words also used and which have been recognized as sufficient to convey real property are "grant, bargain, sell and convey,"[17] or "grant, bargain, sell, release, remise and convey."[18] And the words "granted, bargained, sold" are said to be words usually employed as words of conveyance.[19] But the use of the word "sold" in a contract for the purchase and sale of real estate does not conclusively show a present conveyance.[20] And the words "bargained, sold and delivered" were held not to import a present conveyance where the instrument was signed by the purchaser, which was unnecessary if it was a deed, and where its provisions showed that the

12. McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 104 Am. St. Rep. 84, 1 L. R. A. (N. S.) 315, 79 Pac. 447 (reviewed in Hughes v. Scott, 32 Cal. App. Dec. 75, 190 Pac. 643, in which it is said that in all the cases cited as sustaining the rule in the principal case "it was clearly the intent of the grantor that the conveyance of such interest should not take effect until after the grantor's death, and hence was void as testamentary in character).

13. Civ. Code, § 1092; see supra, § 3. Compare the Spanish word "cedo" used in Mexican conveyances. See infra, § 15.

14. See supra, § 4.

15. Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; San Francisco etc. R. Co. v. City of Oakland, 43 Cal. 502 (construing the term "grant" as contained in an ordinance).

16. San Francisco & O. R. R. Co. v. Oakland, 43 Cal. 502.

17. Rianda v. Watsonville Water etc. Co., 152 Cal. 523, 93 Pac. 79; Muller v. Boggs, 25 Cal. 175.

18. Packard v. Moss, 68 Cal. 123, 8 Pac. 818, 823. Compare supra, § 6.

19. Dietz v. Mission Transfer Co., 95 Cal. 92, 30 Pac. 380.

20. Estate of Goetz, 13 Cal. App. 198, 109 Pac. 145.

parties contemplated the execution of a further assurance to pass the title.[1] On the other hand, a recital in a bill of sale that certain land had been sold "and I do this day give him [the purchaser] a clear bill of sale . . . to have and to hold the same, his heirs, assigns forever," was held to constitute operative words conveying title.[2] In the strict legal sense the term "conveyed" or "conveyance" imports a transfer of legal title to land; but it is also habitually used by lawyers to denote any transfer of title, legal or equitable; and the last is also the popular sense of the term.[3]

§ 15. Miscellaneous Words of Conveyance.—The word "transfer" designates only those transactions which pass, or purport to pass, the title or right of possession to property.[4] While that term is not a word of general use in conveyancing to signify a conveyance of title to property, the codifiers in drawing the civil code made free use of the word "transfer" to indicate a passing of title to property from one living person to another,[5] though outside of California, the term cannot be said to have such a well-defined technical legal meaning, especially when used as a verb.[6] The word "revert" has been construed as an operative word of grant by which a present disposition was made of the reversion following a life estate created by deed.[7] Words of covenant have been held to constitute a present conveyance as where it was stated in an

1. Roberts v. Abbott, 32 Cal. App. Dec. 1026, 192 Pac. 345.

2. Meyers v. Farquharson, 46 Cal. 190 (mining claim).

3. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

4. Scholle v. Finnell, 173 Cal. 372, 159 Pac. 1179 (construing Civ. Code, § 1039, as applied to personal property).

5. See title IV of the Civil Code, entitled "Transfer."

6. Estate of Peabody, 154 Cal. 173, 97 Pac. 184 (construing the word "transfer" as used in a will by a layman who was not supposed to be familiar with the word as used in the code).

7. Hughes v. Scott, 32 Cal. App. Dec. 75, 190 Pac. 643 (distinguishing McGarrigle v. Roman Catholic O. Asylum, 145 Cal. 694, 104 Am. St. Rep. 84, 1 L. R. A. (N. S.) 315, 79 Pac. 447. See supra, § 13).

instrument in the form of an agreement that the party of the first part "hereby covenants and agrees to give up all right and title" to certain property.[8] But the words "waive and renounce" are not words of conveyance.[9] The Spanish word "cedo," meaning "I cede," "I grant," was sufficient to pass title to land under the Mexican law and was the word ordinarily used in Mexican conveyances for that purpose.[10] And the words "enagenacion . . . del terreno," used in Mexican conveyances, without any other limiting term, indicated an intent to convey the fee, and not to create a mere servitude upon the land as a use or usufruct.[11]

§ 16. Signature.—The code provides that a grant of real property, in order to transfer title under the statute of frauds, must be "subscribed by the party disposing of the same, or by his agent, thereunto authorized in writing."[12] A substantially similar statutory provision existed prior to the code.[13] The ancient form of deed required no signature, a sealing being sufficient.[14] But a deed is not invalidated merely because the grantor signs a wrong name, if the true name appears in the body of the instrument and there is a certificate of acknowledgment.[15] Proof that the two names designate the same person is all that is necessary.[16] There is no indispensable or peculiar form for the signing of a deed. Any writing which clearly shows that a party has adopted the deed as his own, intending to be bound by the contents

8. Thompson v. McKay, 41 Cal. 221.

9. Davis v. McGrew, 82 Cal. 135, 23 Pac. 41.

10. Schmitt v. Giovanari, 43 Cal. 617; Mulford v. Le Franc, 26 Cal. 88.

11. Mulford v. Le Franc, 26 Cal. 88.

12. Civ. Code, § 1091; Code Civ. Proc., § 1971; Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019.

13. Statute of Conveyances, act of April 16, 1850, § 1; Woods' Dig. 100.

14. Ingoldsby v. Juan, 12 Cal. 564.

15. Middleton v. Findla, 25 Cal. 76.

16. Tustin v. Faught, 23 Cal. 237. See, also, infra, § 33.

of it, if not a formal, is at least a sufficient execution.[17] As defined by the code,

"Signature or subscription includes mark, when the person cannot write, his name being written near it, by a person who writes his own name as a witness; provided, that when a signature is by mark it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons, who must subscribe their own names as witnesses thereto."[18]

A deed thus signed and acknowledged is prima facie evidence of due execution.[19] And it is not necessary that a grantor's signature be affixed by himself. It may be affixed by another if done in the grantor's presence and by his direction, or he may adopt the signature of another.[20] A deed is not required to be signed by the grantee, but by the grantor only.[1]

§ 17. **Seal.**—A deed which was not executed under seal could not at common law,[2] nor in California prior to the code,[3] convey the strict legal title. But it was not necessary even at common law that a conveyance of every interest in land should be under seal,[4] and the courts of

17. Ingoldsby v. Juan, 12 Cal. 564.

18. Civ. Code, § 14 (in part).

19. Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086.

A signature, purporting to be made by mark, is not a subject of expert testimony. Wolf v. Gall, 176 Cal. 787, 169 Pac. 1017. See EVIDENCE.

20. See infra, § 35.

Where there are two grantors and one of them acts as attorney in fact of the other the one signing must subscribe his name twice, once as attorney in fact for the other and once for himself. Meagher v. Thompson, 49 Cal. 189 (the court saying "one signature and a second seal are not equal to a second subscription").

1. Barr v. Schroeder, 32 Cal. 609; Roberts v. Abbott, 32 Cal. App. Dec. 1026, 192 Pac. 345; Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543. As to conformity required between signatures and parties named in the body of the instrument, see infra, § 30.

2. Ortman v. Dixon, 13 Cal. 33; Ingoldsby v. Juan, 12 Cal. 564.

3. Ortman v. Dixon, 13 Cal. 33; Ingoldsby v. Juan, 12 Cal. 564; McCarron v. O'Connell, 7 Cal. 152; Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209; Burton v. Le Roy, 5 Sawy. 510, Fed Cas. No. 2217. See SEALS.

4. Ingoldsby v. Juan, 12 Cal. 564.

California from the earliest history of the state, recognizing that the distinction between sealed and unsealed instruments was a new arbitrary and unmeaning distinction, refused to go out of their way to give effect to such distinction when the law did not clearly so require it.[5] Thus a written but unsealed instrument purporting to transfer the legal estate in land was held to pass the equitable title or interest,[6] particularly where accompanied by delivery of possession of the land,[7] or was given effect as a contract to convey under the statute of frauds.[8] And it was held that an unsealed "bill of sale" of an equitable right to a conveyance under a parol contract partly performed entitled the purchaser to a conveyance.[9] Consistently with the earlier rule it was held that conveyances not under seal were not entitled to be recorded.[10] But an instrument could not be made effective as a deed unless the intent to make it a sealed instrument was expressed in the body of the instrument.[11] Although if it was apparent from the instrument and the circumstances under which it was executed that it was the intention to adopt a scroll as a seal, this was held to be sufficient.[12] And the existence of a seal was presumed from the statement in the attestation clause to that effect, although no impression appeared upon the paper.[13]

While the law still recognizes that an instrument may be sealed as a matter of formality,[14] all distinctions be-

5. Ortman v. Dixon, 13 Cal. 33.

6. Owen v. Frink, 24 Cal. 171; Ingoldsby v. Juan, 12 Cal. 564; McCarron v. O'Connell, 7 Cal. 152; Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209.

7. Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River etc. Min. Co., 13 Cal. 220.

8. Heinlen v. Martin, 53 Cal. 321; Owen v. Frink, 24 Cal. 171; McDonald v. Bear River etc. Min. Co., 13 Cal. 220.

9. Owen v. Frink, 24 Cal. 171.

10. Racouillat v. Sansevain, 32 Cal. 376.

11. McDonald v. Bear River etc. Min. Co., 13 Cal. 220.

12. Burton v. Le Roy, 5 Sawy. 510, Fed. Cas. No. 2217.

13. Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209 (holding there was a stronger reason for the presumption in the case of secondary evidence consisting of the record of the deed which did not show the existence of a seal).

14. Civ. Code, § 1933.

tween sealed and unsealed instruments are expressly abolished by the code.[15] No seal to a deed of conveyance was required under the civil law.[16] What is sufficient to constitute a seal[17] and the general subject of seals is treated in another article.[18]

§ 18. Acknowledgment or Attestation.—It is not necessary that a deed be witnessed in order to make it effective.[19] It is also a general rule that an acknowledgment of the execution of a deed by the grantor is not essential to its validity; and it operates to convey title as between the parties though unacknowledged.[20] The same doctrine existed under Mexican law.[1] An exception to the rule is found in the conveyance of the homestead of a married person, which is not valid unless acknowledged by both husband and wife.[2] And a similar exception in the case of a conveyance by a married woman formerly existed both prior and subsequent to the adoption of the codes,[3]

15. Civ. Code, § 1629; Code Civ. Proc., § 1932.

16. Stanley v. Green, 12 Cal. 148.

17. Code Civ. Proc., § 1931; Hastings v. Vaughn, 5 Cal. 315; Burton v. Le Roy, 5 Sawy. 510, Fed. Cas. No. 2217.

18. See SEALS. For the use and legal effect of corporation seals, see CORPORATIONS. The corporate seal of the grantor affixed to a deed is prima facie evidence that it was executed under proper authority (Colton L. & W. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878), and that the deed was duly delivered (Vaca Valley etc. R. R. v. Mansfield, 84 Cal. 560, 24 Pac. 145).

19. Schurr v. Rodenback, 133 Cal. 85, 65 Pac. 298.

20. Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301; Hastings v. Vaughn, 5 Cal. 315 (holding a deed should not be rejected as evidence because not acknowledged); Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153. See generally ACKNOWLEDGMENT, vol. 1, p. 223.

1. De Merle v. Mathews, 26 Cal. 455.

2. Civ. Code, § 1242; and see HOMESTEADS.

3. Statute of Conveyances, April 16, 1850, Stats. 1850, p. 254; Woods' Digest, 100; and see Loupe v. Smith, 123 Cal. 491, reviewing §§ 1186, 1187, 1191 and 1093, Civ. Code; Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 155 Pac. 227; Mathews v. Davis, 102 Cal. 202, 36 Pac. 358; Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Danglarde v. Elias, 80 Cal. 65, 22 Pac. 69; Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375; Hand v. Hand,

and until the law of March 14, 1895, which amended section 1093 of the Civil Code to read as it does at present, namely, "A grant or conveyance of real property made by a married woman may be made, executed, and acknowledged in the same manner and has the same effect as if she were unmarried."[4] Such acknowledgment was treated as a part of the execution of a married woman's conveyance; hence an allegation that a deed by a married woman was executed, or was signed and delivered, was a sufficient averment that it was properly acknowledged.[5] But the certificate of the notary taking the acknowledgment was not essential, under the code, if the deed was actually acknowledged,[6] though it seems that prior to the code such certificate was treated as a necessary part of the deed, and with the fact of acknowledgment equally essential to its validity.[7] The purpose of a notary's cer-

68 Cal. 135, 85 Am. Rep. 5, 8 Pac. 705; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Reis v. Lawrence, 63 Cal. 129, 49 Am. Rep. 83; Wedel v. Herman, 59 Cal. 507; McLeran v. Benton, 43 Cal. 467; Landers v. Bolton, 26 Cal. 393; Kays v. Phelan, 19 Cal. 128; Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593; Pease v. Barbiers, 10 Cal. 436 (holding that no presumption of knowledge of the contents of the deed on the part of a married woman arose from the fact of executing it); Selover v. American Russian Com'l Co., 7 Cal. 266 (holding that defective acknowledgments of deeds of married women could not be reformed even in chancery; but this rule was changed by statute of April 13, 1860, followed by § 1202, Civ. Code); Butler v. Welton, 1 Cal. Unrep. 731.

4. Stats. & Amdts. 1895, p. 53; Loupe v. Smith, 123 Cal. 491, 56 Pac. 254 (holding that the law of March 19, 1891, repealing Civ. Code, §§ 1186 and 1191, and a part of § 1187, left § 1093 intact, and hence while abolishing the form did not abolish the necessity of a married woman's acknowledgment; see Stats. & Amdts. 1891, p. 137). See generally ACKNOWLEDGMENTS, vol. 1, p. 223; HUSBAND AND WIFE.

5. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227 (holding upon the same principle that an admission of due execution under Code Civ. Proc., § 448, amounted to an admission that it was acknowledged as required); Danglarde v. Elias, 80 Cal. 65, 22 Pac. 69; Joseph v. Daugherty, 60 Cal. 358 (applying rule to a mortgage of married woman); Kays v. Phelan, 19 Cal. 128.

6. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934.

7. Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934; Wedel v. Herman, 59

tificate of acknowledgment in general is evidentiary, and is requisite to entitle the deed to be recorded, and to enable it to be used as evidence without further proof.[8]

§ 19. Date—Revenue Stamps.—The indorsement of the date on a deed like the allegation of consideration[9] is in effect merely the recital of a fact.[10] It is evidentiary in character and may be modified and shown to be untrue by extrinsic evidence.[11] What effect a delay in placing revenue stamps on a deed has upon the validity of the deed seems to depend largely upon whether or not the purpose of the delay was to defraud the government. And where a deed was delivered but withheld from record at the grantor's request until after his death, and the revenue stamps were not placed upon the deed until just before it was offered for record, it was held, in the absence of any intent to defraud the government, that the deed was not void.[12] In an early California case, decided in the United States court, it was held that where a person received a conveyance that was duly stamped, his rights should be in no way affected by any prior conveyance which was unstamped (in this not observing the provision of the revenue law then in force), the purpose of the statute being simply to render the deed inadmissible as evidence between the parties to it.[13] It is appropriate to direct attention to the fact that the revenue act of October 22, 1914, omitted the words found in former acts which made an instrument invalid and inadmissible as evidence

Cal. 507; Leonis v. Lazzarovich, 55 Cal. 52. See generally ACKNOWLEDGMENT, vol. 1, p. 218; HUSBAND AND WIFE.

8. Homan v. Wayer, 9 Cal. App. 123, 98 Pac. 80; Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301. See generally ACKNOWLEDGMENT, vol. 1, p. 221 et seq.

9. See infra, § 45

10. Rhine v. Ellen, 36 Cal. 362; Peck v. Vandenberg, 30 Cal. 11.

11. See infra, § 85.

12. Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812.

13. Kinney v. Consolidated etc. Min. Co., 4 Sawy. 382, Fed. Cas. No. 7827.

while not properly stamped.[14] And the same is true of the revenue act of February 24, 1919.[15]

III. PARTIES.

Capacity of Grantor.

§ 20. In General.—It is essential to the validity of a deed that there should be legal capacity in the grantor to convey.[16] Incapacity to execute a deed may, as in the case of other contracts,[17] arise from unsoundness of mind,[18] or from a disability arbitrarily imposed by law, as in the case of infants,[19] and as existed to a limited extent in the case of married women prior to the adoption of the code.[20] The right of making and acknowledging a conveyance of property is expressly reserved by law to a person under sentence of imprisonment in a state prison,[1] though his civil rights in general are suspended.[2] The invalidity of an attempted conveyance by a person thus incapacitated results from the absence of the power of consent;[3] and aside from the legal capacity or power

14. Cole v. Ralph, 252 U. S. 286, 64 L. Ed. 567, 40 Sup. Ct. Rep. 321 (the court commenting upon the omission says: "Congress in the later act departed from its prior practice of making such instruments invalid or inadmissible as evidence while remaining unstamped, and elected to rely upon other means of enforcing this stamp provision, such as the imposition of money penalties, fines, and imprisonment."

15. 40 Stats. at Large, 1057; Fed. Stats. Ann., 1919 Supp., p. 90.

16. Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Sunol v. Hepburn, 1 Cal. 254. And see cases cited infra this section, and see §§ 21, 22, infra.

17. See CONTRACTS, vol. 6, p. 30 et seq.

18. See INSANITY.

19. See INFANTS.

20. Meagher v. Thompson, 49 Cal. 189; Dow v. Gould & Curry S. & M. Co., 31 Cal. 629; Dentzel v. Waldie, 30 Cal. 138; Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593; Ingoldsby v. Juan, 12 Cal. 564. For modern rule, see Civ. Code, § 1093. And see HUSBAND AND WIFE.

1. Pen. Code, § 675; see, also, Stats. 1862, p. 496, which contained a similar provision.

2. Pen. Code, §§ 673, 674; Civ. Code, § 1556; and see generally, CIVIL RIGHTS, vol. 5, p. 128.

3. See CONTRACTS, vol. 6, p. 30 et seq.

to consent, the equitable conception of true consent assumes physical power of the party, an intellectual and moral power, and the exercise of these powers freely and deliberately.[4]

§ 21. Mental Soundness—Rule Stated.—It is difficult to formulate any rule determining the degree of mental weakness which will destroy a person's capacity to convey property,[5] and a full discussion of this particular question is not appropriate in this article.[6] The rule laid down in respect to voluntary deeds is about the same as that applied to a disposing mind and memory in the case of a will.[7] It is not actual knowledge that is requisite but the capacity to understand; and mere habits of forgetfulness are not inconsistent with the exercise of intelligence and sound judgment and discretion, and therefore are not of themselves sufficient evidence of a want of capacity to make a deed of gift.[8] In short, mental competency requires that the mind and memory of the grantor be sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the deed.[9] And where such competency did not exist the

4. Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190. As to capacity of Indians to convey real property, see Sunol v. Hepburn, 1 Cal. 254; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; and see INDIANS.

5. Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190.

6. See CONTRACTS, vol. 6, p. 32, and see INSANITY.

7. Avery v. Avery, 42 Cal. App. 100, 183 Pac. 453; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190. See WILLS.

8. President etc. of Bowdoin College v. Merritt, 75 Fed. 480.

9. Crow v. Crow, 168 Cal. 607, 143 Pac. 689; Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276 (holding a finding that the grantor "fully understood the transaction" necessarily involved the inference that he was not "entirely without understanding" and was a finding of the ultimate fact of competency; Civ. Code, § 38, applied); Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Lagenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086 (holding a question improper which called for the abstract opinion of a witness as to whether the grantor was competent to transfer property); Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; Odell v. Moss, 130 Cal.

deed may be set aside.[10] But to avoid a deed on the ground of incompetency it is not necessary to show that the grantor was entirely destitute of understanding.[11] Likewise, it is not every symptom or indication of insanity which will render one incompetent to dispose of his property.[12] Thus a party with a fixed insane delusion may execute a deed if the act is done with full understanding and is not the result of his insane delusion.[13] But if the grantor was incapacitated from exercising a rational care of his property by reason of a mental delusion, the deed may be avoided.[14]

352, 62 Pac. 555; Falk v. Wittram, 120 Cal. 479, 65 Am. St. Rep. 184, 52 Pac. 707; Soberanes v. Soberanes, 106 Cal. 1, 39 Pac. 39, 527; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Maggini v. Pezzoni, 76 Cal. 631, 18 Pac. 687; Gridley v. Boggs, 62 Cal. 190; Harris v. Harris, 59 Cal. 620; Crowther v. Rowlandson, 27 Cal. 377; Smyth v. Fitch, 32 Cal. App. Dec. 228, 190 Pac. 1049; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806; Baldwin v. Trahern, 21 Cal. App. 72, 130 Pac. 1068; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312; Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190 (stating the rule, and that the same principles apply to all agreements inter vivos); Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Springer v. Springer, 6 Cal. Unrep. 662, 64 Pac. 470.

10. Lieman v. Golly, 178 Cal. 544, 174 Pac. 33 (implied); Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820 (holding plaintiff was not required to elect between undue influence and mental incapacity as grounds of the action); Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; Schurr v. Rodenback, 133 Cal. 85, 65 Pac. 298 (implied); Falk v. Wittram, 120 Cal. 479, 65 Am. St. Rep. 707, 52 Pac. 707; Maggini v. Pezzoni, 76 Cal. 631, 18 Pac. 687 (holding it was not necessary to show that an unfair advantage was taken of the grantor's incompetency); Kidder v. Stevens, 60 Cal. 414 (implied); Crowther v. Rowlandson, 27 Cal. 377; Heitman v. Bruns, 37 Cal. App. 489, 174 Pac. 67; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561. And see generally the cases cited supra, this section. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 782.

11. Crother v. Rowlandson, 27 Cal. 377.

12. Avery v. Avery, 42 Cal. App. 100, 183 Pac. 453.

13. Kidder v. Stevens, 60 Cal. 414.

14. Crowther v. Rowlandson, 27 Cal. 377. What constitutes a person "entirely without understanding," see Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276, construing Civ. Code, § 38, and for definition of "incompetent," "mentally incompetent," etc., see Code Civ. Proc., § 1767; and

§ 22. Old Age — Sickness — Illiteracy—Drunkenness.— Old age alone does not render a person incompetent to execute a deed.[15] Nor will sickness, extreme distress or debility of body affect the capacity of the grantor to make a conveyance if sufficient intelligence remains. It is not a question of physical condition, of pain or absence of pain, of long or short life. It is not the soundness of the body, but of the mind, that is requisite. The law looks only to the competency of the understanding.[16] Hence, a person of perfect mental capacity, acting freely and voluntarily who is sick with mortal illness, is as competent to make a voluntary conveyance of his property as when in perfect health, even though such conveyance might seem unreasonable, unjust and unnatural.[17] Nor can a deed be impeached for incompetency of the grantor because of his illiteracy and lack of experience and knowledge, by reason of which he was not able unassisted to care for his property, and was liable to be deceived and imposed upon by designing persons, where he fully understood what he was doing when he executed the deed.[18] But where the grantor was in a drunken condition and wholly incapacitated thereby from attending to business, a deed executed under the representation

see generally CONTRACTS, vol. 6, p. 32; INSANITY. See note, 1 A. L. R. 1517, as to avoiding conveyance by decedent on ground of mental incapacity.

15. Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158; (observing that "philosophers such as Plato, poets such as Goethe and Victor Hugo, artists such as Michael Angelo, Titian and Franz Hals, produced some of their most important works when they had passed the age of seventy-five"); Springer v. Springer, 6 Cal. Unrep. 662, 64 Pac. 470. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 782.

16. Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398; President of Bowdoin College v. Merritt, 75 Fed. 480.

17. Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398.

18. Soberanes v. Soberanes, 106 Cal. 1, 39 Pac. 39; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910.

that it was a letter was not merely voidable but void.[19] Cases in which the grantor has suffered imposition from duress, fraud, or undue influence, by reason of weakness of mind not amounting to absolute disqualification, are considered in subsequent sections.[20]

§ 23. Presumptions—Evidence.—There is a legal presumption of sanity in regard to every man.[1] And the burden of proving insanity of the grantor at time of execution of a deed is upon the one attacking the transfer.[2] Hence proof of insanity at one time carries no presumption of its past existence. And a judgment declaring one judicially insane and committing him is not proof of insanity at a time prior to the date stated therein.[3] On the other hand, an order of court restoring the grantor to competency on the day of the execution of a deed is sufficient to support a finding of capacity to execute the deed on that day.[4] No presumption of impaired intellect can arise alone from impairment of bodily health.[5] And evidence of mere physical condition of the grantor is inadmissible if not shown to have some relation to his mental condition at the time the deed was executed.[6] However, testimony as to the mental condition of the party before and after the time of the making of the instrument is admissible for the purpose of disclosing circumstances tending to show his probable condition of mind at the time of the transaction.[7] Absence of consideration or a grossly

19. Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571.

20. See infra, §§ 103–105. See note, 6 A. L. R. 331, as to relief in equity on ground of intoxication.

1. Avery v. Avery, 42 Cal. App. 100, 183 Pac. 453. See INSANITY.

2. Gridley v. Boggs, 62 Cal. 190.

3. Avery v. Avery, 42 Cal. App. 100, 183 Pac. 453.

4. Smyth v. Fitch, 32 Cal. App. Dec. 228, 190 Pac. 1049.

5. Springer v. Springer, 6 Cal. Unrep. 662, 64 Pac. 470.

6. Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551.

7. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

The fact that a grantor, while engaged in business during a period of eleven years following the execu-

inadequate one is a circumstance which may be considered on the question of the grantor's competency, upon the principle that one of the indicia of a disordered mind is that its possessor is quite liable to act against his own plain interest in cases where the act could not be imputed to mistake.[8] Testimony on the subject of the mental competency of the grantor by persons formerly but not recently intimately acquainted with him and his mental condition is admissible, the objection as to remoteness going rather to the weight than to the admissibility of the testimony.[9]

Necessity and Capacity of Grantee.

§ 24. **In General.**—It is involved in the very conception of a deed that there must be a grantee to whom delivery is made and in whom the title can vest.[10] Hence a deed which fails to name a grantee,[11] or a grantee who may be ascertained,[12] or which designates as grantee a mere fictitious person[13] is a nullity.[14] The grantee designated must

tion of his deed, was rash in some of his speculations, erratic in conduct and irascible in temper, was held not to establish his insanity at the time of executing the conveyance, even though at the end of such period he was committed to an asylum: Falk v. Wittram, 120 Cal. 479, 65 Am. St. Rep. 184, 52 Pac. 707.

8. Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914.

But the record of probate proceedings and judgment refusing probate of the will of a deceased grantor on the ground that he was of unsound mind at the date of its execution are not admissible to impeach on the same ground a deed of the grantor executed a few months subsequent thereto; Gridley v. Boggs, 62 Cal. 190 (holding such proceeding was not a special inquiry to determine the mental status of the grantor, hence the finding of insanity was only of a probative fact, and did not have the conclusive effect of a judgment within Code Civ. Proc., § 1908). See CANCELLATION OF INSTRUMENTS, vol. 4, p. 783.

9. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

10. Wilson v. White, 84 Cal. 239, 24 Pac. 114; Wunderlin v. Cadogan, 50 Cal. 613.

11. See infra, § 28.

12. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092; Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57.

13. See infra, § 30.

14. Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57 (approved in Rix-

be a person in esse,[15] either natural or artificial,[16] and capable of taking title to the property conveyed.[17] It has been held that the fact that a deed to a corporation was dated prior to the time its articles were filed did not invalidate the conveyance, where the delivery and acceptance occurred after the incorporation.[18]

§ 25. Infants—Married Women—Aliens—Deceased Person and His Heirs.—The capacity of infants to receive conveyances of real property is involved in their general capacity to contract and is considered in another part of this work.[19] As a rule, an infant is presumed to accept what is for his benefit, hence it is said that a deed to an infant requires no acceptance in order to make it effective.[20]

Whatever disability a married woman may originally have had to receive a conveyance of real property has been removed by statute.[1] However, a wife could at an early day receive a conveyance even from her husband without the intervention of a trustee.[2]

The code provides that an "alien may take, hold, and dispose of property, real or personal within this state."[3] At common law an alien could not take a conveyance of land for his own use; but if he did do so the title remained in him until office found. And under Mexican law an alien grantee acquired a defeasible estate in property conveyed to him, which he retained, unless deprived of it by the

ford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092).

15. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092; Phelan v. San Francisco, 6 Cal. 531.

16. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092.

17. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092; Phelan v. San Francisco, 6 Cal. 531; Sunol v. Hepburn, 1 Cal. 254.

18. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295; see, also, § 20, supra, and § 84, infra.

19. See INFANTS.

20. See infra, § 72.

1. Civ. Code, § 164.

2. Barker v. Koneman, 13 Cal. 9. See for a discussion of this subject, HUSBAND AND WIFE.

3. Civ. Code, § 671.

proceeding of denouncement, or by the sovereign authority.[4]

A deed to a man who is dead at the time of its execution and to his heirs is a nullity; the word "heirs" is not a word of purchase, but limits and only qualifies the title of the grantee.[5]

§ 26. Unincorporated Associations.—A grantee if not a natural, must be an artificial person.[6] Hence, in general, a grant to an unincorporated body of persons is considered void because the grantee is incapable of taking.[7] And the same was true at common law.[8] The rule has also been applied to deeds to partnerships in the firm name,[9] the effect of such conveyance being at most to vest title in one or more of the individual partners where they are designated with sufficient certainty in the firm name.[10] But it has been held that a valid grant may be made to trustees for an unincorporated voluntary association, such as a tribe of Indians living in a communal state, and the title will descend in perpetuity.[11] And it appears that there are exceptions to the rule, as in cases where property has been granted to such an association, for charitable purposes and has been taken possession of and continuously used for such purposes. But such an exception was held not to apply where the grantee named in the deed was a "church community," which was an unincorporated asso-

4. De Merle v. Mathews, 26 Cal. 455. See generally ALIENAGE AND CITIZENSHIP, vol. 1, p. 896.

5. Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543. See infra, §§ 133–138.

6. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092.

7. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092; Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57; Wiseman v. McNulty, 25 Cal. 230; Ketchum v. Barber, 2 Cal. Unrep. 698, 12 Pac. 251.

8. Ruddick v. Albertson, 154 Cal. 640, 98 Pac. 1045.

9. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092 (implied); Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57. See PARTNERSHIP.

10. See infra, § 32.

11. Ruddick v. Albertson, 154 Cal. 640, 98 Pac. 1045. See, also, INDIANS.

ciation of persons, and whose members never asserted any right or set up any claim under the deed.[12] A grant may be made to a class if the members of the class are sufficiently described so as to distinguish them from all other persons.[13]

Designation of Parties.

§ 27. In General.—A conveyance to be effective must contain the names of the parties, and the party passing the right must be the grantor.[14] Hence, a deed signed and acknowledged by persons named in the body of the instrument as grantors, and by others as well, is not the deed of those not named as grantors.[15] In such case the latter persons do not bind themselves to anything more than is declared on the face of the instrument, which is that the grantors named have transferred their interest.[16] Similarly a deed which names the husband as sole grantor does not transfer or encumber any interest of the wife, although signed by her, for the reason that the instrument does not indicate any intent on her part to transfer her interest.[17] This is especially true where the property conveyed is a homestead, the husband and wife being required in such case to join in the conveyance.[18] The principle, however, does not apply to cases arising under the old law which required a conveyance of the separate property of a married woman to be executed by both herself and husband. In those cases it was not essential that

12. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092 (holding the deed passed neither legal nor equitable title).

13. Friedman v. Goodwin, 1 McAll. 142, Fed. Cas. No. 5119 (applied to public grants).

14. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227.

15. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; Roberts v. Abbott, 32 Cal. App. Dec. 1026, 192 Pac. 345.

16. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227.

17. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227.

18. Civ. Code, § 1242. See HOMESTEADS.

the husband be named as a grantor in the deed, for the reason that the husband had no interest to convey, and his concurrence in the instrument was required merely as a protection to the wife against imposition or to afford her his protection, or similar reasons of policy.[19] While it is not essential that the grantee be designated in the deed by his proper name, there must be some certain and definite description by which he can be ascertained.[20] Otherwise the deed is insufficient.[1]

§ 28. Omission of Grantee's Name.—Under the principle that a deed is insufficient as a conveyance unless it designates a grantee,[2] a deed in due form, signed and acknowledged by the grantor, but leaving the grantee's name blank, does not become the grantor's deed until the name of a grantee is inserted therein.[3] And if such blank deed is left with the grantor's agent who without authority and in the absence of the grantor fills in the name of a grantee and subsequently delivers it,[4] or the deed is delivered to the purchaser who afterwards inserts the name of a different person as grantee,[5] the deed is fraudulent in law and void and conveys no title, and purchasers from the grantee with notice acquire no title.[6] In

19. Cordano v. Wright, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; Dentzel v. Waldie, 30 Cal. 138; Ingoldsby v. Juan, 12 Cal. 566, See generally HUSBAND AND WIFE.

20. Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57; and see infra, § 30.

1. Civ. Code, § 1971; and compare § 24, supra.

2. See supra, § 27.

3. Harris v. Barlow, 180 Cal. 142, 179 Pac. 682; Arguello v. Bours, 67 Cal. 447, 8 Pac. 49; Wunderlin v. Cadogan, 50 Cal. 613; Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Dutton v. Locke-Paddon, 37 Cal. App. 693, 174 Pac. 674 (implied).

4. Arguello v. Bours, 67 Cal. 447, 8 Pac. 49 (holding it insufficient to pass the legal title, though the grantee had entered into possession and paid the purchase price); Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266.

5. Wunderlin v. Cadogan, 50 Cal. 613.

6. Wunderlin v. Cadogan, 50 Cal. 613. But the one executing an instrument may, under some circumstances, be estopped to deny authority. See Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328, a case of bond; and see generally ESTOPPEL.

view of the code provision that "an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing,"[7] the authority to insert names of parties in a deed must be in writing; it cannot be conferred by parol.[8] And this was the rule prior to the code.[9] This interpretation obtains notwithstanding the abolition of the distinction between sealed and unsealed instruments.[10] The rule, of course, has no application in the case of the substitution of the name of a different grantee, where made with the consent of the grantor and before delivery.[11]

§ 29. Vesting Interest in Stranger.—One may take an interest in property by virtue of a deed though he is not named therein as a party, under the code provision that "a present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto."[12] But a stranger cannot take title under a conveyance by means of an exception or reservation inserted therein in his favor.[13] It is apparent that the code provision above quoted does not obviate the necessity for naming a grantee in the deed, as without such designation

7. Civ. Code, § 2309 (in part). And see Code Civ. Proc., § 1971, requiring such authority in an agent to be in writing. See, also, CONTRACTS, vol. 6, p. 224 et seq.

8. Harris v. Barlow, 180 Cal. 142, 179 Pac. 682.

9. Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 26. See Stats. 1850, p. 266.

10. See § 17, supra; Harris v. Barlow, 180 Cal. 142, 179 Pac. 682. It has been said that the rule that authority to fill in the name of a grantee cannot be conferred by parol rests largely, if not entirely, on the common-law doctrine in relation to instruments under seal, and that it seems that where seals are abolished the rule should no longer obtain. See 8 Cal. Law Rev. 121. But this contention took no account of section 2309 of the Civil Code, which expressly provides that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.

11. Dutton v. Locke-Paddon, 37 Cal. App. 693, 174 Pac. 674. As to filling blanks in instruments generally, see ALTERATION OF INSTRUMENTS, vol. 1, pp. 1083 et seq.

12. Civ. Code, § 1085.

13. See infra, § 191.

the deed would be inoperative.[14] The rule as codified was not the law prior to the code.[15]

§ 30. Fictitious or Assumed Name.—It is obvious that a deed to a mere fictitious person is a nullity,[16] for the reason that it is in effect an omission of the name of the grantee.[17] On the other hand, a grant to an actual person by a fictitious or assumed name by which he is known and passes,[18] or which he has assumed for the occasion,[19] is valid. Thus if an intended grantee accepts a deed in which he is designated by a wrong name he is deemed to have adopted the designation as his true name for the purpose of the conveyance under the presumption that a grantee who personally accepts, retains, and records a deed of conveyance, does so with knowledge of its contents.[20] And the grantee may be designated by other description than his proper name, if such description is sufficiently certain and definite.[1] Likewise, if the owner of property convey by any name, the conveyance as between himself and his grantee is valid and will transfer title.[2] This is in consonance with the principle of com-

14. See supra, §§ 24, 27.

15. Eldridge v. See Yup Co., 17 Cal. 44. (It is here laid down as an acknowledged rule of law "that a person who is not a party to a deed cannot take anything by it unless it be by way of remainders. The grantor cannot covenant with a stranger to the deed." The same is quoted in Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal. App. 451, 181 Pac. 98.

16. Wilson v. White, 84 Cal. 239, 24 Pac. 114; Barr v. Schroeder, 32 Cal. 609 (dissenting opinion maintaining there was no legal evidence that there was no such grantee as named, and therefore that the title was presumptively vested in him).

17. Barr v. Schroeder, 32 Cal. 609. See supra, § 28.

18. Emery v. Kipp, 154 Cal. 83, 129 Am. St. Rep. 141, 16 Ann. Cas. 792, 19 L. R. A. (N. S.) 983, 97 Pac. 17; Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; Garwood v. Hastings, 38 Cal. 216; Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347.

19. Wilson v. White, 84 Cal. 239, 24 Pac. 114.

20. Emery v. Kipp, 154 Cal. 83, 129 Am. St. Rep. 141, 16 Ann. Cas. 792, 19 L. R. A. (N. S.) 983, 97 Pac. 17.

1. Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57.

2. Emery v. Kipp, 154 Cal. 83, 129 Am. St. Rep. 141, 16 Ann. Cas. 792, 19 L. R. A. (N. S.) 983, 97 Pac. 17; Wilson v. White, 84 Cal. 239, 24 Pac. 114; Fallon v. Kehoe,

mon law that a man may change his name at will, the name being only a means of designating the person intended.[3] Accordingly, a person may acquire title by one name and transfer it by a different name;[4] subject, however, to the statutory provision that "any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, must, in any conveyance of said real estate so held, set forth the name in which he or she derived title to said real estate."[5] Previous to this statutory enactment there was no such requirement in the statutes or at common law, and the execution of a conveyance of land by the owner in his true name, though different from that by which he acquired it, when duly recorded, operated as constructive notice of the transfer, and took precedence of a subsequently recorded deed to the same land executed in the name by which it was acquired.[6] But the statute does not apply to a case where the grantee's name was inserted in error.[7]

§ 31. Erroneous Name—Correction.—It has been held that if the grantee is misnamed in the body of the deed the grantor cannot correct the mistake by a second deed, or place a new title of record in a different grantee, and it is further held that such an error cannot be corrected by a decee in a suit to which the nominal grantee in the first deed was not a party, the court remarking, however, that if such nominal grantee be joined and he is made a party to the proceeding and jurisdiction obtained over him, a decree in rem correcting the mistake might be suffi-

38 Cal. 44, 99 Am. Dec. 347; Homan v. Wayer, 9 Cal. App. 123, 98 Pac. 80.

3. Emery v. Kipp, 154 Cal. 83, 129 Am. St. Rep. 141, 16 Ann. Cas. 792, 19 L. R. A. (N. S.) 983, 97 Pac. 17. See generally NAMES.

4. Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347.

5. Civ. Code, § 1096 (being a codification of § 1 of Act No. 904, approved March 11, 1874; Stats. 1873–74, p. 345. See, also, Civ. Code, Appendix, p. 950.

6. Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347.

7. See infra, § 31.

cient.[8] Furthermore, it has been held that the defect cannot be corrected by the grantee executing a deed in his true name, and reciting that the name by which he was designated in the former deed was erroneous, and this is true even though the later deed recites that the grantor is the identical person to whom conveyance was made under the name used in the erroneous deed. While such recitals may be true in fact, they can only be properly established of record by a judgment reforming the deed.[9] Section 1096 of the Civil Code providing that a conveyance made by one after he has had his or her name changed must set forth the name by which the title to the property was derived,[10] has no application to a case where the grantee's name was inserted in error.[11]

§ 32. **Examples of Particular Designations.**—While a partnership as such does not have legal capacity to take title to land,[12] where the firm name consists of the surnames of the several parties, and if members of the partnership are designated with sufficient certainty in the firm name, the deed will vest the legal title in them; but a general or an abbreviated term such as "Company," "Co." or "Bro.," is held to be insufficient.[13] Thus a conveyance of land to "A B and Company" vests the legal title in "A B" alone, and a deed subsequently executed by "A B" passes a valid title to his grantee.[14] In a case where tenants in common were acting under an unincorporated company name, it has been held that they were

8. Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315.

9. Peckham v. Stewart, 97 Cal. 147, 31 Pac. 928 (holding such deed was not a sufficient compliance with an agreement for a "good and perfect" title).

10. See supra, § 30.

11. Peckham v. Stewart, 97 Cal. 147, 31 Pac. 928.

12. See supra, § 26.

13. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092; Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57; Wiseman v. McNulty, 25 Cal. 230; Ketchum v. Barber, 2 Cal. Unrep. 698, 12 Pac. 251.

14. Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57; Ketchum v. Barber, 2 Cal. Unrep. 698, 12 Pac. 251.

incapable, in such company name, of taking and holding lands by grant, or by any other means by which the title to real estate would pass.[15] In respect to identifying a grantee, a grantee may be sufficiently described as the wife of a person named, or the son or daughter or other relative of a particular person specified, or by the name of his office if there be no other person who can answer the description.[16]

§ 33. Evidence—Identity of Parties.—Evidence aliunde the deed is admissible to identify a party described therein other than by his real name. Such evidence does not change the written instrument, or add new terms to it, but merely fixes and applies the terms already contained in it.[17] Under the rule that identity of person is presumed from identity of name,[18] the identity of the defendant in a suit to quiet title, with the grantor named in a deed under which the plaintiff claims, is presumed from the identity of their names.[19] And a grantor may be identified with the patentee of a land grant by the identity of their names, together with a reference to the source of title.[20] Similarly, where the grantee was described as being of a certain county, designated by name, in a certain state, but it appeared there was no such county in the state mentioned, and the party claiming as grantee resided in a county of that name but in a different state, it was

15. Wiseman v. McNulty, 25 Cal. 230. See generally Associations, vol. 3, p. 348; and see PARTNERSHIP.

16. Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57 (arguendo). As to sufficiency of designation of grantor where deed is executed by agent, see infra, § 36. See infra, § 33, as to evidence of identity of parties.

17. Wilson v. White, 84 Cal. 239, 24 Pac. 114 (see, also, Woodward v. McAdam, 101 Cal. 438, citing a case from another jurisdiction in which it was held that the omission of the Christian names of the grantees could be removed by parol proof; and compare Garwood v. Hastings, 38 Cal. 216, where the court points out that at common law the Christian name was alone recognized as the legal name; and see NAMES).

18. Code Civ. Proc., § 1963 subd. 25.

19. Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.

20. Mott v. Smith, 16 Cal. 533.

held the identity of the grantee was sufficiently established.[1] In the case of a deed of gift, where two relatives of the grantor each bore the name of the nominal grantee, it was held that evidence of possession of the property and certain proprietary acts by one of such persons was sufficient to identify the intended grantee.[2]

Parties by Joinder, Adoption and Representation.

§ 34. Joint Parties.—Though a deed purports to be the deed of two grantors, if the execution by one is invalid it may be deemed to be the sole deed of the other.[3] Upon the same principle a deed executed by several persons, by their attorney in fact, is admissible in evidence upon a showing that the power was executed by one of them.[4] It is not essential, as a rule, that a deed should be executed by all of the several grantors named in it, but it is good as to those who actually sign and deliver it and suffices to convey their interest in the property.[5] But where a deed is drawn with the obvious intention of its being executed by all of the parties thereto, the grants being interdependent as in the case of a deed of partition, it is an inchoate instrument and not effective as a deed until all have executed it,[6] the presumption of law being that it is not to take effect until all have signed.[7] One who has no interest to convey cannot by joining in a deed as a mere volunteer and without consideration create in his favor a contractual obligation on the part of the grantee, or, a fortiori, of his assignee.[8] On the other hand, a grantor by joining in a deed may bind himself to covenants contained in it,

1. Stewart v. Sutherland, 93 Cal. 270, 28 Pac. 947.

2. Luty v Cresta, 4 Cal. App. 589, 88 Pac. 642.

3. Hager v. Spect, 52 Cal. 579.

4. Spect v. Gregg, 51 Cal. 198; and see infra, § 36.

5. Tustin v. Faught, 23 Cal. 237; Colton v. Seavey, 22 Cal. 496.

6. Center v. Davis, 113 Cal. 307, 54 Am. St. Rep. 352, 45 Pac. 468; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Tewksbury v. O'Connell, 21 Cal. 60.

7. Tewksbury v. O'Connell, 21 Cal. 60.

8. Morenhout v. Brown, 1 Cal. Unrep. 139.

although he has no interest in the land conveyed.[9] A deed naming several grantees, where each takes a separate and defined interest, is to be treated as if made separately to each grantee.[10]

§ 35. Adoption of Acts of Others.—The requirement of section 1091 of the Civil Code that a grant of real property shall be subscribed by the grantor in order that the title may be thereby transferred does not render it necessary that his signature shall be affixed by himself, but it may be affixed by another, if done in his immediate presence and under his immediate direction.[11] The one acting for the grantor, in such case, so far as the signature to the instrument is concerned, is a mere amanuensis of the grantor; he is only the instrument,—the hand, as it were, of the grantor.[12] And for a stronger reason where the grantor, who is unable to use his hand, requests another to assist him with his signature, and such person by guiding his hand makes the signature, the deed is sufficiently signed.[13] The general principle that one who has capacity to execute a deed may also do so through a properly authorized agent is well recognized,[14] the primary requisite of the delegated authority being, as above indicated, that it be evidenced by writing. And while a grantor

9. Holzheier v. Hayes, 133 Cal. 456, 65 Pac. 968.

10. Murray v. Tulare Irr. Co., 120 Cal. 311, 52 Pac. 586 (holding that the acknowledgment taken by one of the grantees sufficiently proved the deed as to all the grantees except as to the one taking the acknowledgment).

11. Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019; Jansen v. McGahill, 22 Cal. 563, 83 Am. Dec. 84; Videau v. Griffin, 21 Cal. 390.

12. Videau v. Griffin, 21 Cal. 390.

13. Harris v. Harris, 59 Cal. 620.

14. Civ. Code, § 1091; Ayres v. Palmer, 57 Cal. 309; Heinlen v. Martin, 53 Cal. 321; Spect v. Gregg, 51 Cal. 198; Gerdes v. Moody, 41 Cal. 335; Alemany v. Daly, 36 Cal. 90; Morrison v. Bowman, 29 Cal. 337; Echols v. Cheney, 28 Cal. 157; Kimball v. Semple, 25 Cal. 440; McDonald v. The Bear River etc. Min. Co., 13 Cal. 220; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Sullivan v. Davis, 4 Cal. 291; McFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248. And see cases cited infra, this section.

may adopt and ratify a signature made by another without previous authority, as by acknowledgment before a notary[15] no subsequent acknowledgment will make such a deed valid,[16] unless under the principle of equitable estoppel.[17] What in general constitutes the formal requisites of authority to execute a deed on behalf of another and the sufficiency of the execution in form to bind the principal, are considered elsewhere.[18] It is also an established principle that the act of the agent must be legally identical with that authorized.[19] Hence the general rule is that a deed assumed to be executed by an attorney in fact but without authority or in excess of authority is void.[20] Though where the execution by the agent was within the power conferred, but was made in the agent's own interest, the delivery by the grantor personally was held to ratify the act.[1] A deed is also invalid where executed by officers of private corporations when not properly authorized, or when not executed pursuant to the authority conferred.[2] And the same rule applies to deeds executed without authority by officers of municipal corporations.[3]

§ 36. In Representative Capacity.—The principle that restricts the power of an agent to the limits of his au-

15. Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019.

16. Videau v. Griffin, 21 Cal. 390. Compare Civ. Code, § 2310, and see AGENCY, vol. 1, p. 776.

17. See ESTOPPEL.

18. See AGENCY, vol. 1, p. 712 et seq.

19. See AGENCY, vol. 1, p. 761.

20. Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Hager v. Spect, 52 Cal. 579; Mott v. Smith, 16 Cal. 533; Dupont v. Wertheman, 10 Cal. 354.

1. Mowry v. Mowry, 103 Cal. 314, 37 Pac. 398.

2. Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Pekin Min. & Mill. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679; McShane v. Carter, 80 Cal. 310, 22 Pac. 178; McCrosky v. Ladd, 3 Cal. Unrep. 432, 28 Pac. 216. See CORPORATIONS.

3. Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301; Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18. See MUNICIPAL CORPORATIONS; PUBLIC OFFICERS.

thority in the execution of a deed[4] applies also to persons executing deeds in a representative capacity as in the case of trustees,[5] executors and administrators,[6] public officers, etc.,[7] but as thus applied it is more appropriately treated in connection with those subjects. Although a deed executed by an executor or administrator without authority in his official capacity, as such, is inoperative, this, however does not prevent it from being given effect as his individual deed, where it was also executed in his individual capacity.[8] And the fact that a grantor designates himself in a deed as "executor" or "administrator" does not make the deed other than his individual conveyance, where such terms are merely descriptive.[9] Where a wife took an estate under a will as legatee, executrix and guardian, with power to sell and dispose of the entire estate, the fact that she described herself as "executrix" was held not to restrict or limit the estate conveyed.[10] Similarly, where a deed recited that the grantors comprised the last board of directors of a defunct corporation, but did not purport to convey the title of the company, and where the grantors signed as individuals, not as trustees, it was held that it was merely the individual deed of the grantors.[11] What form is generally deemed sufficient to constitute a conveyance by a person in a representative or official capacity as distinguished from mere agency,[12] is treated in other articles.[13]

4. See supra, § 36.

5. See TRUSTS.

6. See EXECUTORS AND ADMINISTRATORS.

7. See PUBLIC OFFICERS; JUDICIAL SALES. As to the grant of a public officer made as a public act, being prima facie evidence of the power to make it, see United States v. Peralta, 60 U. S. (19 How.) 342, 15 L. Ed. 678.

8. Morrison v. Bowman, 29 Cal. 337.

9. Conroy, Estate of, 6 Cal. App. 741, 93 Pac. 205 (holding the grantor's designation as administrator would be rejected as surplusage).

10. Norris v. Harris, 15 Cal. 226.

11. Warden v. South Pasadena Realty etc. Co., 178 Cal. 440, 174 Pac. 26.

12. See supra, § 36.

13. See CONTRACTS, vol. 6, p. 38; EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES; PUBLIC OFFICERS; TRUSTS.

IV. CONSIDERATION.

§ 37. Necessity.—By express code provision a consideration is not necessary to the validity of a voluntary transfer.[14] The same rule existed prior to the code.[15] A deed without consideration is therefore good if executed voluntarily with knowledge of its contents and with intent to convey,[16] though its covenants may not be enforceable because mere executory contracts requiring a valuable consideration.[17] The rule necessarily follows from the incontrovertible right of every one to dispose of his own property according to his own volition,[18] in the absence of fraud or undue influence.[19] Such a deed does not differ from any other deed in binding the grantor,[20] and can only be attacked by those having superior equities which the grantor had no right to cut off, such as those of creditors.[1] The right of the grantor's creditors to attack his voluntary deed[2] and the doctrine of bona fide purchaser for value without notice,[3] are treated elsewhere. In consonance with the general rule that equity will not enforce a contract unless founded upon sufficient consider-

14. Civ. Code, § 1040; see supra, § 2; Lieman v. Golly, 178 Cal. 544, 174 Pac. 33; Treat v. Treat, 170 Cal. 329, 150 Pac. 53, 57; Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Brison v. Brison, 75 Cal. 525, 17 Pac. 689; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Ferguson v. Ash, 27 Cal. App. 375, 150 Pac. 657; McDonnell v. McDonnell, 10 Cal. App. 62, 101 Pac. 40 (holding that a plea of want of consideration not made in connection with an allegation of fraud and undue influence, but as a separate and distinct defense, constituted no defense, and no finding on it was required).

15. More v. More, 56 Cal. 89.

16. Lieman v. Golly, 178 Cal. 544, 174 Pac. 33.

17. Estate of Porter, 138 Cal. 618, 72 Pac. 173, 8 R. C. L. 961; and see COVENANTS, vol. 7, p. 714.

18. Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158.

19. Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158; McDonnell v. McDonnell, 10 Cal. App. 62, 101 Pac. 40. See, also, § 99, infra.

20. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

1. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153.

2. See FRAUDULENT CONVEYANCES.

3. See VENDOR AND PURCHASER.

ation,[4] an imperfect conveyance, without a valid or meritorious consideration, will not be enforced in equity against the grantor, or subsequent voluntary grantees.[5] By the law as it existed under Mexican dominion a deed of gift to a stranger, possession being delivered, was good, subject to certain qualifications which limited the right to make and receive donations.[6]

§ 38. Sufficiency in General.—The consideration sufficient to support a deed may be either a good or a valuable one following an ancient distinction,[7] the essentials of which are fully considered elsewhere in this work.[8] The question of the character of the consideration usually arises and becomes important, in determining whether a conveyance is voluntary, that is, a gift, or a purchase,[9] or whether one claiming under a deed has a superior equity to some prior claimant.[10] Thus, a deed from a grantor to his infant son is without legal consideration and voluntary as against creditors, where given in consideration of services performed by the son, the grantor not being legally bound to pay for his son's services;[11] and where the grantor owed his son and ward a certain sum of money, and the latter did not consent to the application of the indebtedness as consideration for the transfer

4. See SPECIFIC PERFORMANCE.

5. Burton v. Le Roy, 5 Sawy. 510, Fed. Cas. 2217 (holding the relation of son-in-law does not constitute such a valuable or meritorious consideration as to take the case out of the rule).

6. Havens v. Dale, 18 Cal. 359.

7. Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905 (construing "good consideration" as used in § 1605, Civ. Code); Frey v. Clifford, 44 Cal. 335; Clark v. Troy, 20 Cal. 219 (construing "valuable consideration" as used in § 26, of the conveyancing act, April 16, 1850; Stats. 1850, p. 254; Wood's Digest, p. 100); Lindley v. Blumberg, 7 Cal. App. 140, 93 Pac. 894.

8. See CONTRACTS, vol. 6, p. 163 et seq.

9. See 8 R. C. L. 963. Applying the distinction as fixing the status of property conveyed, as separate community property, see HUSBAND AND WIFE.

10. See supra, § 37.

11. Swartz v. Hazlett, 8 Cal. 118.

and there was no sanction of the probate court.[12] Similarly, a promise by a grantor to his wife on her deathbed that their son should have certain property was a mere moral consideration for the subsequent conveyance to the son and did not defeat an intervening equity acquired by a third person.[13] A conveyance has been held supported by good and sufficient consideration where based upon a mortgage on the land conveyed,[14] a pre-existing indebtedness,[15] an assumption of the grantor's indebtedness,[16] a signing of the grantor's note as surety,[17] a transfer of corporation stock,[18] an agreement to do assessment work on a mine,[19] a promise to pay certain sums to third persons to whom the grantor was under no legal obligation,[20] and upon services rendered by grantor's child, for though such services are presumed to be gratuitous, the presumption is not conclusive.[1] And a deed is supported by a good and sufficient consideration where based upon a detriment to the grantee from reservations in a deed, resulting in the loss of the right to impose tolls upon the grantor or his assigns, as upon others, in the use of certain premises,[2] or on an agreement to care for, maintain or support

12. Peek v. Peek, 77 Cal. 106, 11 Am. St. Rep. 244, 1 L. R. A. 185, 19 Pac. 227.

13. Peek v. Peek, 77 Cal. 106, 11 Am. St. Rep. 244, 1 L. R. A. 185, 19 Pac. 227.

14. Crabtree v. Potter, 150 Cal. 710, 89 Pac. 971; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599.

15. Greenwalt v. Mueller, 126 Cal. 636, 59 Pac. 137; Saunderson v. Broadwell, 82 Cal. 132, 23 Pac. 36; Adams v. Lombard, 80 Cal. 426, 22 Pac. 180; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242; Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659.

16. Manning v. App Consolidated Gold Min. Co., 171 Cal. 610, 154 Pac. 301; Norris v. Lilly, 147 Cal. 754, 109 Am. St. Rep. 188, 82 Pac. 425.

17. Grigsby v. Shwarz, 82 Cal. 28, 22 Pac. 1041.

18. Clint v. Eureka Crude Oil Co., 3 Cal. App. 463, 86 Pac. 817.

19. Shaw v. Caldwell, 16 Cal. App. 1, 115 Pac. 941.

20. Ellis v. Funk, 32 Cal. App. 426, 163 Pac. 332.

1. Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158.

2. Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905.

the grantor,[3] or third persons.[4] Furthermore, a deed based upon an agreement for care and maintenance cannot be set aside because such an agreement is unenforceable,[5] or because the grantor lived only a short time after executing it,[6] or where the money value of the support, in view of other facts established, was unimportant to fix.[7] But mere expectancy of support without a contractual obligation is not sufficient.[8] The consideration for a deed does not have to be executed in order to make the deed operative.[9] And it has been held that an execution of a will devising all property of which the maker might die seised does not constitute valuable consideration for a deed executed in reliance thereon.[10]

§ 39. Relationship — Love and Affection. — Love and affection have been held sufficient consideration to support a deed from parent to child,[11] from husband to wife,[12] and from uncle to niece;[13] love and affection may

3. Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Norris v. Lilly, 147 Cal. 754, 109 Am. St. Rep. 188, 82 Pac. 425; Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; Miller v. Shaw, 34 Cal. App. Dec. 180, 195 Pac. 743; Holmes v. O'Brien, 28 Cal. App. 264, 151 Pac. 1151; Rogers v. Scott, 28 Cal. App. 93, 151 Pac. 379; Silveria v. Alexander, 25 Cal. App 506, 144 Pac. 303; Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312; Bretthauer v. Folley, 15 Cal. App. 19, 113 Pac. 356; Barry v. St. Joseph's Hospital, 5 Cal. Unrep. 625, 48 Pac. 68.

4. Tisdale v. Bryant, 38 Cal. App. 750, 177 Pac. 510.

5. Norris v. Lilly, 147 Cal. 754, 109 Am. St. Rep. 188, 82 Pac. 425 (overruling Grimmer v. Carlton, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043).

6. Silveria v. Alexander, 25 Cal. App. 506, 144 Pac. 303; Barry v. St. Joseph's Hospital, 5 Cal. Unrep. 625, 48 Pac. 68.

7. Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312.

8. Odell v. Moss, 130 Cal. 352, 62 Pac. 555.

9. Gerke v. Cameron, 5 Cal. Unrep. 798, 50 Pac. 434.

10. Brown v. Burbank, 64 Cal. 99, 27 Pac. 940.

11. Prey v. Stanley, 110 Cal. 423, 42 Pac. 908; Nichols v. Emery, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398.

12. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Emmons v. Burton, 109 Cal. 662, 42 Pac. 303; In re McEachran, 82 Cal. 219, 23 Pac. 46; Barker v. Koneman, 13 Cal. 9; Springer v. Springer, 6 Cal. Unrep. 662, 64 Pac. 470.

13. Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356.

also sustain a deed from uncle to grand-nephew, where the grantor stands in loco parentis to the grantee, and there is a close relation of trust and confidence between the parties.[14] But where a deed designated the grantee as the son-in-law of the grantor, it was held that such words were merely descriptive of the person and did not express a consideration for the instrument.[15] Love and affection and a purpose to provide for the support and maintenance of the grantor's wife and family are such consideration as the law regards with favor and supports even as against subsequent creditors,[16] unless made with actual intent to defraud creditors.[17] And where a deed from husband to wife was based upon love and affection, it was held sufficiently supported though there was a contemporaneous agreement to live apart and not to molest each other.[18] If this character of consideration existed when the deed was executed, it is good subsequently though it has disappeared.[19]

§ 40. **Marriage and Promise to Marry.**—A legal contract and promise made in good faith to marry another,[20] like an actual marriage,[1] must be deemed to be a valuable consideration for a conveyance. Marriage being in its nature permanent and the most important of all civil relations,[2] constitutes the highest and most valuable of

14. Crow v. Crow, 168 Cal. 607, 143 Pac. 689 (inferentially decided).

15. Burton v. Le Roy, 5 Sawy. 510, Fed. Cas. No. 2217.

16. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Barker v. Koneman, 13 Cal. 9.

17. Emmons v. Burton, 109 Cal. 662, 42 Pac. 303; In re McEachran, 82 Cal. 219, 23 Pac. 46.

18. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

19. Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356.

20. Conner v. Stanley, 65 Cal. 183, 3 Pac. 668.

1. Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904; Cohen v. Knox, 90 Cal. 266, 13 L. R. A. 711, 27 Pac. 215; Peek v. Peek, 77 Cal. 106, 11 Am. St. Rep. 244, 1 L. R. A. 185, 19 Pac. 227 (applying the rule to a promise to convey); Barker v. Koneman, 13 Cal. 9; Klauber v. Vigneron, 3 Cal. Unrep, 795, 32 Pac. 248.

2. See MARRIAGE.

considerations for the transfer of property.[3] And in so far as the validity of a deed depends upon a consideration of marriage, the grantee is in as firm and sure a position as if he had paid the consideration in money to the full value of the property conveyed.[4] It has been said that a voluntary conveyance to a daughter intended as a settlement, and without previous reference to her marriage, may be supported upon that consideration, if upon the credit of the conveyance a person has been induced to marry her. "The law does not require a delicate investigation into the quantum of influence which her property has had with her suitor."[5]

§ 41. Inadequacy of Consideration.—Mere inadequacy of consideration is never of itself sufficient ground for setting aside a deed;[6] and the amount of consideration in the absence of any imputation of fraud, is immaterial to the question.[7] While inadequacy of price is a circumstance proper to be considered in determining the question of good faith,[8] it will not the less fall within the legal definition of a valuable consideration, however disproportionate it may be to the value of the property conveyed.[9] Thus, a finding of a good and valuable consideration for a deed is supported by evidence of the payment of one dollar therefor.[10] Any disproportion of the

3. Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904; Cohen v. Knox, 90 Cal. 266, 13 L. R. A. 711, 27 Pac. 215.

4. Cohen v. Knox, 90 Cal. 266, 13 L. R. A. 711, 27 Pac. 215.

5. Cohen v. Knox, 90 Cal. 266, 13 L. R. A. 711, 27 Pac. 215 (by McFarland, J., arguendo).

6. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Silveria v. Alexander, 25 Cal. App. 506, 144 Pac. 303; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Barry v. St. Joseph's Hospital etc., 5 Cal. Unrep. 625, 48 Pac. 68. See CANCELLATION OF INSTRUMENTS, vol. 4, pp. 786, 787.

7. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Silveria v. Alexander, 25 Cal. App. 506, 144 Pac. 303. See, also, § 101, infra.

8. Clark v. Troy, 20 Cal. 219; Lindley v. Blumberg, 7 Cal. App. 140, 93 Pac. 894.

9. Clark v. Troy, 20 Cal. 219. As to the different classes of consideration, see supra, § 38.

10. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471.

consideration to the actual value of the property conveyed does not affect the question of the kind of consideration, that is, as to whether the consideration is a valuable or a good one.[11] In determining the character of the transaction, however, as, for instance, whether the instrument was intended as a mortgage,[12] or a deed of gift or of purchase,[13] the disproportion between the price named and the value of the property is one of the elements to be considered. Of course, a deed cannot be attacked for inadequacy of consideration where such matter is absolutely within the discretion of the grantor, as where a deed was executed pursuant to a power which conferred that right upon him.[14] Where certain covenants of the grantee in consideration of a deed were performed, but certain others were not performed, it was presumed in the absence of fraud or mistake that the covenants performed were a fully adequate consideration for the grant.[15]

§ 42. Want or Failure of Consideration.—A deed without fraud in its inception conveys the title, and is not void on account of failure of consideration,[16] either whole or in part.[17] And inasmuch as acts done subsequent to the execution of a deed cannot affect its integrity,[18] a subsequent failure of consideration,[19] or breach of a personal covenant[20] not amounting to a condition,[1] will not avoid

11. Lindley v. Blumberg, 7 Cal. App. 140, 93 Pac. 894. See supra, § 38.

12. Lynch v. Lynch, 22 Cal. App. 653, 135 Pac. 1101. See MORTGAGES.

13. Salmon v. Wilson, 41 Cal. 595; Peck v. Vandenberg, 30 Cal. 22. See HUSBAND AND WIFE; and see, also, GIFTS.

14. Lewis v. Lewis, 3 Cal. App. 727, 86 Pac. 994. See POWERS.

15. Womble v. Womble, 14 Cal. App. 739, 113 Pac. 353.

16. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398.

17. Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276.

18. Tisdale v. Bryant, 38 Cal. App. 750, 177 Pac. 510.

19. Duckworth v. Watsonville Water etc. Co., 170 Cal. 425, 150 Pac. 58; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904.

20. Tisdale v. Bryant, 38 Cal. App. 750, 177 Pac. 510; Womble v. Womble, 14 Cal. App. 739, 113 Pac. 353.

1. Duckworth v. Watsonville, 170

the deed. Section 1689 of the Civil Code, providing for the rescission of contracts for a failure of consideration through the fault of the party as to whom rescission is made, does not apply to a conveyance of land executed in reliance upon a future promise, where the vendor waives actual performance as a condition of vesting the title.[2] The grantor's only remedy for the breach of a personal covenant is an action for damages.[3] And the failure of a grantee to perform such a covenant does not constitute a defense to an action in which the grantee is seeking to establish property rights conveyed by the deed. The rights being vested in the grantee by the conveyance, the case is not one for specific performance, and the equitable principles involved in that doctrine do not apply.[4] Failure to perform an executory covenant constituting consideration for a deed may sometimes give ground for equitable relief from the conveyance where the circumstances stamp it as having the character of a condition subsequent, though not so expressed.[5] And of course relief is always available in cases of fraud.[6]

§ 43. Breach of Promise to Support.—No distinction has been made in California between a consideration of support and maintenance and any other consideration, in applying the principles enunciated in the preceding paragraph. Thus, it has been held that where the grantor

Cal. 425, 150 Pac. 58; Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Martin v. Splivalo, 69 Cal. 611, 11 Pac. 484 (holding that an agreement in a deed to assume and pay a mortgage indebtedness is not a condition within the rule); Hartman v. Reed, 50 Cal. 485.

2. Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382.

3. Hartman v. Reed, 50 Cal. 485; Schott v. Schott, 168 Cal. 342, 143 Pac. 595. See COVENANTS, vol. 7, pp. 774–778.

4. Duckworth v. Watsonville W. & L. Co., 170 Cal. 425, 150 Pac. 58.

5. Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385 (case of deed of mining interest on shares, the court deeming it somewhat analogous to a cropper's contract).

6. See infra, § 101.

accepts the verbal promise of the grantee for support without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance, in the absence of fraud, actual or constructive, the grantor would have no right to rescind, or to have the deed set aside.[7] On the other hand, it was said by way of dictum in a case of mixed consideration, that if the grantee refuses to execute an agreement to support, the grantor may rescind, but this rescission would involve a cancellation of the deed only upon terms agreeable to equity. In such case equity would take cognizance of the value of the services rendered and the moneys paid, the valuation of the occupation of the land by the promisors, and reach its conclusion under the evidence as to the terms upon which a cancellation of the deed should be decreed.[8] It is obvious that where the grantee stands ready and willing to perform his agreement to support, the deed cannot be set aside for want or failure of consideration.[9] A distinction, however, is made in some other jurisdictions and relief afforded from conveyances given for support on nonperformance,[10] although there is considerable conflict, not only as to the grounds and form of the relief, but as to the exact nature of the transaction itself.[11]

§ 44. **Effect of Illegality.**—Section 1608 of the Civil Code provides that "If any part of a single consideration

7. Schott v. Schott, 168 Cal. 342, 143 Pac. 595. See infra, § 399 et seq., as to fraud. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 785.

8. Norris v. Lilly, 147 Cal. 754, 109 Am. St. Rep. 188, 82 Pac. 425 (overruling Grimmer v. Carlton, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043, on the point that a deed given in consideration of support would be canceled because the covenant could not be specifically enforced). See Cruickshank v. Vogh, 32 Cal. App. Dec. 722, 192 Pac. 86, which impliedly supports this dictum.

9. Creswell v. Welchman, 95 Cal. 359, 30 Pac. 553; Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312.

10. See 8 R. C. L. 967; and see note, 130 Am. St. Rep. 1054.

11. 8 Ruling Case Law, 927.

for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."[12] It has been held that whatever effect this section may have upon executory contracts where part of the consideration is unlawful, it cannot be construed to permit a grantor of property, who has received and retained the consideration for his conveyance, to set it aside upon the sole ground that the consideration was unlawful in part. Hence, the mere fact that a part of the consideration for a transfer consisted of a covenant which could not be legally enforced, does not make the deed absolutely void.[13]

§ 45. **Recital in General—As Evidence.**—A deed as a written instrument[14] is presumptive evidence of a consideration,[15] and the burden of showing a want of consideration is upon the party seeking to invalidate or avoid it.[16] Hence, the recital of a consideration is not required in a deed in order to give it effect;[17] and even at common law a bargain and sale deed could be sustained, though it did not express a consideration, if there was a consideration in fact.[18] Also, under the Mexican law, prior to the acquisition of California by the United States, a deed was not invalidated by the failure to express a consideration,[19] though earlier decisions held a contrary view.[20]

12. See CONTRACTS, vol. 6, p. 194, et seq.

13. Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276. And see CONTRACTS, vol. 6, p. 195.

14. Civ. Code, § 1614; Code Civ. Proc., § 1614; Code Civ. Proc., § 1963, subd. 39; and see CONTRACTS, vol. 6 p. 196.

15. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Martin v. Splivalo, 69 Cal. 611, 11 Pac. 484 (holding deed admissible without pleading or proving consideration); Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551 (approving an instruction to this effect); Lewis v. Lewis, 3 Cal. App. 727, 86 Pac. 994; Blair v. Squire, 6 Cal. Unrep. 350, 59 Pac. 211.

16. Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551; Blair v. Squire, 6 Cal. Unrep. 350, 59 Pac. 211.

17. Goad v. Moulton, 67 Cal. 536, 8 Pac. 63; compare § 46, infra.

18. Peck v. Vandenberg, 30 Cal. 11.

19. Schmitt v. Giovanari, 43 Cal. 617; Merle v. Mathews, 26 Cal. 455; Havens v. Dale, 18 Cal. 359.

20. Stafford v. Lick, 10 Cal. 12;

Where the payment of a valuable consideration becomes a material question, the recital in a deed of a valuable consideration paid by the grantee is only evidence of such payment as against the grantor,[1] or against those claiming under the grantor by a subsequent conveyance;[2] but it is evidence of the payment of a valuable consideration only against those claiming under the grantor by conveyance subsequent to the same.[3] It is, therefore, not evidence as against strangers,[4] nor as against the owner of a prior equity,[5] nor as against one claiming under a prior deed from the same grantor. Such recitals are but the declarations or admissions of the grantor,[6] and are subject to the same rules of evidence as declarations of a party in general.[7] One claiming as a bona fide purchaser for a valuable consideration under a second deed, but recorded first in point of time, must affirmatively prove the payment by other evidence than the deed itself.[8] But it has been held that a recital in a deed that the consideration was paid by the grantee named is proof of the fact against a third person claiming to have paid the consideration, though not conclusive.[9]

Burton v. Le Roy, 5 Sawy. 510, Fed. Cas. No. 2217.

1. Mowry v. Mowry, 103 Cal. 314, 37 Pac. 398.

A recital in a deed that the grantor has sold the described premises to the grantee implies that a price was paid for the transfer, Merle v. Mathews, 26 Cal. 455.

2. Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172.

3. Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172.

4. Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172.

5. Lakin v. Sierra Buttes Gold Min. Co., 25 Fed. 337.

6. Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Long v. Dollarhide, 24 Cal. 218; Colton v. Seavey, 22 Cal. 496; Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153.

7. See EVIDENCE. Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Colton v. Seavey, 22 Cal. 496.

8. Long v. Dollarhide, 24 Cal. 218; VENDOR AND PURCHASER.

9. Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889 (holding the legal presumption to be that the grantee pays the consideration); Millard v. Hathaway, 27 Cal. 119; and see infra, § 47.

§ 46. **Formal Recital—Historical Reason.**—It was a settled rule at common law that if no consideration for a bargain and sale deed was expressed or proved, the use or beneficial interest resulted to the grantor. To prevent this it became a common practice to make the deed recite a consideration, for in such case if the grantor were permitted to show by parol testimony that no consideration was in fact paid, it would be permitting him to show in opposition to the deed itself that he had made no conveyance of a beneficial interest, and would prevent the deed from operating according to its terms. This the policy of the law would not permit him to do, and he was held estopped by the formal recital from showing the fact for the purpose of preventing his deed from operating to pass an estate.[10] But the equitable doctrine of resulting trust has never been applied to mere voluntary conveyances which purport to be for the beneficial use of the grantee.[11] As shown in prior paragraphs, neither a recital of a consideration[12] nor a consideration in fact[13] is necessary to support a deed as a valid conveyance of land,[14] if executed voluntarily with knowledge of its contents and with intent to convey.[15] The mere fact of the grantee being a volunteer will not of itself create any presumption that the grantor did not intend to convey the beneficial interest. As has been observed, the grantee in such case "need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it away from him."[16] The general subject of the disposition of the beneficial as distinguished

10. Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Peck v. Vandenberg, 30 Cal. 11 (per Sawyer, J.; approved in Rhine v. Ellen, 36 Cal. 362).

11. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

12. See supra, § 45.

13. See supra, § 37.

14. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984 (implied, the court holding it was not necessary to consider the point); Goad v. Moulton, 67 Cal. 536, 8 Pac. 63; Civ. Code, § 1040.

15. Lieman v. Golly, 178 Cal. 544, 174 Pac. 33.

16. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

from the legal interest, and particularly of resulting trusts, is treated under another title.[17]

§ 47. Extrinsic Evidence of Consideration, or to Vary Recital.—It is well established that parol evidence is admissible for the purpose of contradicting or showing that the true consideration of a deed is other and different from that expressed in it.[18] This is not a rule but an exception to the general rule that the legal effect of a written instrument cannot be varied or defeated in whole or in part by parol evidence. The exception, however, can never be allowed to override the rule,[19] hence parol evidence is not admissible for the purpose of defeating the operation of a deed or contradicting and defeating covenants in a deed by which rights are expressly vested.[20] Accordingly, a statement or acknowledgment of consideration merely as a fact, and which is only used as evidence of a fact, and not as evidence of a contract or right, is susceptible of explanation by extrinsic circumstances or facts. The limitation found in some authorities restricting such evidence to the "same species" of consideration as that expressed in the deed, has been declared not to rest upon any sound principle.[1]

Applying these general principles, the omission of any recital of consideration is not conclusive evidence that

17. See TRUSTS.

18. Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23; Adams v. Lombard, 80 Cal. 426, 22 Pac. 180; Bennett v. Solomon, 6 Cal. 134; and see cases cited infra, this section. See CONTRACTS, vol. 6, p. 196 et seq.

19. Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23 (citing Hendrick v. Crowley, 31 Cal. 472).

20. Winchester v. Winchester, 175 Cal. 391, 165 Pac. 965; Treat v. Treat, 170 Cal. 329, 150 Pac. 53; Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23 (approved in Aitchison v. Carruthers, 161 Cal. 7); Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Rhine v. Ellen, 36 Cal. 362; Peck v. Vandenberg, 30 Cal. 11; Coles v. Soulsby, 21 Cal. 47.

1. Peck v. Vandenberg, 30 Cal. 11; Coles v. Soulsby, 21 Cal. 47 (compare Bennett v. Solomon, 6 Cal. 134, which seems to recognize that such limitation might exist).

none passed,[2] and it may be shown that the consideration acknowledged in a deed to have been paid was never in fact paid.[3] It may also be shown that the real consideration was of a different amount from that expressed in the deed,[4] or of an entirely different character,[5] or that it was dependent upon conditions which had not happened and might never happen,[6] or that a deed reciting a money consideration was a gift,[7] or that the true consideration was love and affection.[8] But where a deed was executed in furtherance of a contract in which there were interdependent covenants, an offer to show that there was no consideration behind the conveyance was denied on the ground that the case did not fall within the exception.[9] Of course, where a deed is assailed on the ground of fraud, a recital of consideration may be contradicted.[10] The admissibility of parol evidence to vary or contradict the recitals of consideration for the purpose of showing a resulting trust either in the grantor or a third person is treated elsewhere.[11]

2. Rhine v. Ellen, 36 Cal. 362; Peck v. Vandenberg, 30 Cal. 11; Merle v. Mathews, 26 Cal. 455.

3. Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119; Ingersoll v. Truebody, 40 Cal. 603; Rhine v. Ellen, 36 Cal. 362 (an action to recover the purchase price in such case "in no way calls in question the operation of the deed to pass a legal title to the grantees named").

4. Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119.

5. Klumpke v. All Persons, 176 Cal. 300, 168 Pac. 366; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Irvine v. McKeon, 23 Cal. 472.

6. Moffatt v. Bulson, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022; Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119 (holding a parol agreement to pay consideration was not within the statute of frauds. See FRAUDS, STATUTE OF); Ingersoll v. Truebody, 40 Cal. 603.

7. Higgins v. Higgins, 46 Cal. 259.

8. Klumpke v. All Persons, 176 Cal. 300, 168 Pac. 366; Treat v. Treat, 170 Cal. 329, 150 Pac. 53.

9. Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23.

10. Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Peck v. Vandenberg, 30 Cal. 11; Coles v. Soulsby, 21 Cal. 47. See generally TRUSTS; FRAUD AND DECEIT.

11. See infra, § 235; and see TRUSTS.

V. DELIVERY AND ACCEPTANCE.

Necessity.

§ 48. **Delivery.**—There is no better established legal principle than that the transfer of the ownership of real estate, so far as the transfer is to be made by deed, necessitates a delivery of that deed to effectuate the passing of title from the grantor to the grantee.[12] Delivery is the force that vitalizes the instrument[13] without which, though signed and acknowledged,[14] it is invalid, and not effective for any purpose.[15] If delivery is wanting the deed is void ab initio,[16] and is no better than a blank form.[17] Consequently it is recognized that prior to its actual delivery, the grantor named in the instrument may

12. Civ. Code, § 1054, reads: "A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor." Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; McGrath v. Hyde, 81 Cal. 38, 22 Pac. 293; Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193; Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734; Hibbard v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Boyd v. Slayback, 63 Cal. 493; Fitch v. Bunch, 30 Cal. 208; Dyson v. Bradshaw, 23 Cal. 528; Bensley v. Atwill, 12 Cal. 231; City Lumber Co. v. Brown, 31 Cal. App. Dec. 844, 189 Pac. 830; McLaughlin v. Phillips, 31 Cal. App. Dec. 818, 189 Pac. 788; Dutton v. Locke-Paddon, 37 Cal. App. 693, 174 Pac. 674; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Holmes v. Salamanca G. M. etc. Co., 5 Cal. App. 659, 91 Pac. 160; Hibberd v. Smith, 1 Cal. Unrep. 554; Mitchell v. Welden, 1 Lab. 160.

13. Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664.

14. Hasshagen v. Hasshagen, 80 Cal. 514, 22 Pac. 294; Dutton v. Locke-Paddon, 37 Cal. App. 693, 174 Pac. 674.

15. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Hasshagen v. Hasshagen, 80 Cal. 514, 22 Pac. 294; Ward v. Dougherty, 75 Cal. 240, 17 Pac. 173; Boyd v. Slayback, 63 Cal. 493; Barr v. Schroeder, 32 Cal. 609.

16. Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106.

17. Dutton v. Locke-Paddon, 37 Cal. App. 693, 174 Pac. 674.

change the character of the delivery originally contemplated, and has the right to destroy and nullify the instrument itself.[18] And this operative characteristic of delivery is not peculiar to deeds, but attaches to all written contracts.[19] But delivery, as thus applied to private conveyances, has no application to grants made by the government, evidenced either by an alcalde's grant or a patent.[20]

§ 49. Acceptance.—The law does not force a man to take title of real property against his will.[1] Hence the assent of the grantee is necessary in order to make a delivery effective and the deed operative as such.[2] Neither under the civil nor the common law was a donation valid and obligatory until accepted.[3] But actual acceptance is not required. It may under some circumstances be presumed,[4] as in the case of a deed to an infant,[5] or where it is obviously for the benefit of the grantee.[6] The necessity of an acceptance is sometimes expressed in terms of delivery, as where it is said that the intention of both the grantor and grantee that the deed shall operate as a delivered instrument is essential to its delivery.[7] It is also

18. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867.

19. Civ. Code, §§ 1626, 1627. See, also, CONTRACTS, vol. 6, p. 235 et seq.

20. Miller v. Ellis, 51 Cal. 73; Donner v. Palmer, 31 Cal. 500; Downer v. Smith, 24 Cal. 114. See generally PUBLIC LANDS.

1. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

2. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Fenton v. Alsip, 79 Cal. 402, 21 Pac. 839; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Harris v. Harris, 59 Cal. 620; De Levillain v. Evans, 39 Cal. 120; Bensley v. Atwill, 12 Cal. 231; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948; Hibberd v. Smith, 1 Cal. Unrep. 554.

3. De Levillain v. Evans, 39 Cal. 120.

4. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Civ. Code, § 1059. See infra, § 51; and infra, §§ 72–75.

5. See infra, § 72.

6. See infra, § 75.

7. Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897.

sometimes expressed in terms of agreement, as where it is said that a deed to be effective requires a meeting of the minds of the parties.[8] Such expressions, of course, are only different ways of saying that there must be an acceptance of the deed by the grantee. An exception to the rule is found in the execution of a deed of trust,[9] for if the trustee refuses or is unable to act, it is a well recognized principle that a court of chancery will execute the trust.[10]

Nature and Sufficiency in General.

§ 50. Definition and Elements of Delivery.—"Delivery" is a word of well-defined meaning in the law. It is the act, however evidenced, by which the instrument takes effect and title thereby passes.[11] While it is frequently used in a popular sense as designating the mere transfer of physical custody or possession,[12] in legal contemplation it is one of the acts involved in the "execution" of a deed and is included in that term when the latter is used in a technical sense.[13]

The elements of delivery are, that the writing must be meant by the maker to take immediate effect, and be presumably, or in fact, accepted by the other party,[14] the delivery and acceptance being of necessity simultaneous

8. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

9. Smith v. Davis, 90 Cal. 25, 27 Pac. 26.

10. See TRUSTS.

11. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1.

12. Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Dean v. Parker, 88 Cal. 283, 26 Pac. 91; Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812.

13. Code Civ. Proc., § 1933; Campbell v. Genshlea, 180 Cal. 219, 180 Pac. 336; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812; Callahan v. James, 7 Cal. Unrep. 82, 71 Pac. 104. See CONTRACTS, vol. 6, p. 235 et seq.

14. Harris v. Harris, 59 Cal. 620.

and correlative acts.[15] Therefore, when the minds of the parties meet, expressly or tacitly, in the purpose to give the deed present effect, the delivery is completed.[16] And the implication is that no further act on the part of the grantor remains to be done to make the deed fully operative.[17]

§ 51. General Principles Stated.—Whether a deed has been delivered, either to the grantee, or to depositary for the grantee,[18] is a question of fact to be determined from the circumstances surrounding each particular transaction,[19] and the essential fact to be ascertained is the intention as to the passing of title.[20] Because of the variety of the circumstances under which delivery may be accomplished, it is impossible to state in exact terms what shall or shall not constitute a delivery, in order that a paper may be given full operation as a deed.[1] There are some cases in which the intent is so plainly

15. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46. Compare with the doctrine of relation stated, infra, § 87.

16. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

17. Bias v. Reed, 169 Cal. 33, 145 Pac. 516.

18. Bias v. Reed, 169 Cal. 33, 145 Pac. 516. As to delivery to depository, see infra, §§ 65–71.

19. Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Dean v. Parker, 88 Cal. 283, 26 Pac. 91; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Hastings v. Vaughn, 5 Cal. 315; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806; Hibberd v. Smith, 1 Cal. Unrep. 554.

20. Dean v. Parker, 88 Cal. 283, 26 Pac. 91; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561.

1. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

indicated that but one conclusion can be deduced with reference thereto; in such cases the question of delivery becomes matter of law. But in other cases, where the intent is to be inferred from circumstances in their nature equivocal, the solution becomes one of difficulty, and depends so much upon the subjective state of the mind of the person or persons trying the issue, that the law can lay down no certain rule on the subject.[2] Delivery may be either actual or constructive,[3] and may be made by the grantor himself or by an authorized agent;[4] but it must be accomplished during the lifetime of the grantor.[5] The question of delivery also involves a consideration of the personnel of the parties, as whether, for example, a party is an infant;[6] and of their soundness of mind, as whether they are capable of giving their assent to the deed;[7] and of the nature of the transaction, as whether it is a family settlement, in which case there is a stronger presumption of delivery than in other cases.[8] Other rules of more frequent application are elaborated in subsequent sections.[9]

§ 52. Cardinal Rule of Intention.—Execution and delivery of a deed depend upon more than the mechanical acts of signing it and passing it to another person.[10] There must be an active and conscious participation in the transfer.[11] The act of delivery must be accompanied

2. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

3. Civ. Code, § 1059, reads as follows: "Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: 1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or, 2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed."

4. See infra, § 65 et seq. And see AGENCY, vol. 1, p. 683.

5. See infra, § 64.

6. See infra, § 72.

7. See supra, § 20 et seq.

8. See infra, § 72.

9. See infra, §§ 52–83.

10. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892.

11. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561.

with the intent that the deed shall become presently operative as such,[12] i. e., that it pass title irrevocably[13] and finally,[14] even though the right to possession and enjoyment may not accrue until some future time.[15] The rule applies whether delivery be to the grantee directly,[16] or to a third person on his behalf,[17] and irrespective of

12. Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Harris v. Harris, 59 Cal. 620; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806.

It is the intention, rather than the mode of exercising the intention, that is the crucial point. Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664; Hibberd v. Smith, 1 Cal. Unrep. 554.

13. Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898. See Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897, holding that a deed in favor of a third person given by one party to another pursuant to an agreement for a settlement of accounts, and recorded by the latter without the knowledge or consent of the grantee, is not delivered. See, also, supra, § 49.

14. Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782.

15. President etc. of Bowdoin v. Merritt, 75 Fed. 480.

16. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940; Stone v. Daily, 181 Cal. 571, 185 Pac. 665 (involving two deeds, one delivered to grantee and the other to a third person); Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Kenney v. Parks, 137 Cal. 527, 70 Pac. 556; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734; Harris v. Harris, 59 Cal. 620; Hastings v. Vaughn, 5 Cal. 315; McLaughlin v. Phillips, 31 Cal. App. Dec. 818, 189 Pac. 788; Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812; Shannon v. Aagaard, 45 Cal. App. 733, 188 Pac. 317; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479; Stanton v. Freeman, 19 Cal. App. 464, 126 Pac. 377; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Melvin v. Melvin, 8 Cal. App. 684, 97 Pac. 696; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

17. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; In re Cor-

whether the conveyance is absolute or conditional in its provisions.[18] The vital importance of intention has been variously indicated by the courts. Thus, it is declared to be the main or vital thing,[19] or the one essential[20] to the valid delivery of a deed. The final question always is, what was the intent with which the formality of a delivery was gone through with?[1] And it is the intent which restricts or enlarges the effect of the instrument.[2] The intent is a question of fact to be solved in the light of all the circumstances surrounding the transaction.[3]

nelius' Estate, 151 Cal. 550, 91 Pac. 329; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Ord v. Ord, 99 Cal. 523, 34 Pac. 83; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; McCord v. Maddux, 36 Cal. App. Dec. 450, 202 Pac. 459; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120 (subsequent dealing with deed by grantor and depositary showed delivery was not irrevocable); Hibberd v. Smith, 1 Cal. Unrep. 554.

18. Kenney v. Parks, 137 Cal. 527, 70 Pac. 556. See infra, §§ 60, 61, as to effect of direct delivery to grantee upon condition; and see infra, § 69, as to distinction between deed and escrow. See generally ESCROW.

19. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Ord v. Ord, 99 Cal. 523, 34 Pac. 83; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; Hastings v. Vaughn, 5 Cal. 315; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892.

20. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; McCord v. Maddux, 36 Cal. App. Dec. 450, 202 Pac. 459; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782.

1. Stone v. Daily, 181 Cal. 571, 185 Pac. 665 (approved in Marple v. Jackson, 184 Cal. 411, 193 Pac. 940).

2. Whitney v. American Ins. Co., Black v. Sharkey, and Hibberd v. Smith, supra.

3. Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Estate of Cornelius, 151 Cal. 550, 91 Pac. 329; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; McCord v. Maddux, 36 Cal. App. Dec. 450, 202 Pac. 459; McLaughlin v. Phillips, 31 Cal. App. Dec. 818, 189 Pac. 788; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806.

It is obvious that where, by reason of mental and physical weakness one may be incapable of exercising the necessary intent, there can be no effective delivery.[4]

§ 53. Rule Applied to Oral Expressions and Stipulations.—An express declaration of delivery accompanying the manual tradition of the deed, while of great weight in determining the intent,[5] is not conclusive as to the intent.[6] Thus, it has been shown that such formal delivery was only a part of the plan of the parties, which included the subsequent deposit of the deed with a third person, the final delivery to be conditioned upon the survivorship of the grantee.[7] If the intention is to vest the title in the grantee, it is entirely immaterial that he is requested not to record the deed until after the grantor's death.[8] Nor is the inference of an intent to make an operative delivery necessarily overcome by such a request,[9] though it may be evidence going to the question of intent as affecting delivery.[10] Thus, where the parties believed that the deed could have no operative effect until recorded, a stipulation that it should not be recorded, negatived any intent that it should become presently operative, and hence it was held that there was no delivery.[11] The fact that the grantee erroneously believed that if he should die before

4. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561. See supra, § 20 et seq.

5. Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Reed v. Smith, 125 Cal. 491, 58 Pac. 139; Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948. And compare infra, § 78.

6. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782.

7. Stone v. Daily, 181 Cal. 571, 185 Pac. 665. Compare § 70, infra.

8. Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

9. Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812.

10. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708.

11. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Kenney v. Parks, 137 Cal. 527, 70 Pac. 556.

the grantor, the latter could destroy the deed and so revest title, has no pertinency to the issue of its delivery.[12] Even the expressed purpose of the grantor to avoid the necessity of administration upon his estate, made at the time of the delivery of the deed, is not necessarily inconsistent with an intent presently and irrevocably to pass the title.[13]

§ 54. Applied to Involuntary Transfers — Transfers Other Than for Delivery.—The intention being a vital element in delivery,[14] the mere manual tradition of a deed, the possession of which was obtained by the grantee by fraud and deceit, cannot be in any legal sense a delivery;[15] nor where the grantor had mistaken the nature of the instrument, as where he executed and delivered a deed under the belief that it was a will,[16] or a mere receipt. To be a voluntary delivery it is essential that the character of the instrument be known as well as that delivery be intended.[17] For the same reason, there is no delivery where the deed is placed in the hands of the grantee merely for safekeeping;[18] or with instructions to place in a safe deposit box for the grantor, to which both parties have access;[19] or, in short, for any purpose which negatives an intention to make the deed operative as such.[20]

12. Tyler v. Currier, 147 Cal. 31, 81 Pac. 319; Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547.

13. Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898; Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Mowry v. Heney, 86 Cal. 471, 25 Pac. 17.

14. See supra, § 52.

15. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Clint v. Eureka Crude Oil Co., 3 Cal. App. 463, 86 Pac. 817.

16. Nelson v. Thomas, 36 Cal. App. 433, 172 Pac. 398.

17. Holmes v. Salamanca G. M. etc. Co., 5 Cal. App. 659, 91 Pac. 160.

18. Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734; Melvin v. Melvin, 8 Cal. App. 684, 97 Pac. 696.

19. Elliott v. Merchants' Bank etc. Co., 21 Cal. App. 536, 132 Pac. 280.

20. Kenney v. Parks, 137 Cal. 527, 70 Pac. 556 (holding a deed not delivered where deposited with the grantee without intention to give it present effect, the court stating it was unnecessary to discuss the decisions holding "that

Likewise, there is no delivery if the grantee secures possession of the deed clandestinely,[1] or in any manner without fulfillment of agreed conditions and consent of the grantor to a delivery,[2] as where it was understood that the grantee should execute a mortgage concurrently with the delivery of the deed, and he took possession of the deed during the negotiations and secretly obtained a loan on the property.[3] Nor is one bound by the manual delivery of a quitclaim deed to him, where, by reason of his illiteracy, he was ignorant of the nature of the instrument,[4] or where it described different land than he was entitled to,[5] where, in each case, he immediately returned the deed upon discovering the fact, there having been no intention to accept the deed as an operative and binding act.

§ 55. Rule Applied to Certain Particular Acts.—The law states no infallible test by which it may be determined whether or not any particular act affords evidence of intent to make delivery, each case being best determined in the light of its own circumstances.[6] Certain acts, con-

the delivery of a deed to the grantee to take effect upon the death of the grantor is an effective delivery, or the construction of the much misunderstood rule laid down in section 1056 of the Civil Code." See infra, § 60); Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; McLaughlin v. Phillips, 31 Cal. App. Dec. 818, 189 Pac. 788; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782; Stanton v. Freeman, 19 Cal. App. 464, 126 Pac. 377; Towne v. Towne, 6 Cal. App. 697, 92 Pac. 1050.

1. Cappler v. Cowan, 39 Cal. App. 630, 179 Pac. 526; Rising v. Gibbs, 3 Cal. Unrep. 506, 30 Pac. 589.

2. Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Haskell v. Doty, 78 Cal. 424, 21 Pac. 10 (applying the rule to simple contract).

3. Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323 (dissenting opinion of Beatty, C. J., holding the deed operated as an estoppel against the grantor because of his negligence).

4. Rosenthal v. Silveira, 42 Cal. App. 637, 184 Pac. 58.

5. Fenton v. Alsip, 79 Cal. 402, 21 Pac. 839 (in such case it was not necessary to tender a reconveyance before suing to recover the purchase price, the title not having vested).

6. See infra, § 56.

sidered with other facts in the case, have been held to indicate such an intention, as, for example, where the notary who took the acknowledgment of the deed handed it to the grantee in the presence of the grantor;[7] or where the grantor left the deed in the grantee's house;[8] or where the grantor, in executing a deed to his wife, placed it on her table, directing her at the time to put it away, and saying that it could be recorded any time.[9] And where a notary drew a deed and took the acknowledgment at a chance meeting with the grantor, the grantor's request to the notary to deliver the deed was held to show an effective delivery, though the notary had to return to his office to attach the seal.[10] On the other hand, the delivery of the deed by the notary without objection by the grantor does not necessarily include the grantor from subsequently denying the delivery.[11] In still another case the receiving a deed by the grantee and keeping it until his death has been held to be sufficient prima facie evidence of acceptance.[12]

§ 56. **Formal Requisites in General.**—An effective delivery of a deed requires some outward physical manifestation from which the intent to deliver it may be inferred. Whatever method of delivery is adopted, there must be a plain showing that the grantor by acts or words, or both, intended to divest himself of title.[13] No particular form of delivery is necessary; but any words or acts which manifest an intention on the part of the grantor that a

7. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Harris v. Harris, 59 Cal. 620.

8. McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566.

9. McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

10. Crozer v. White, 9 Cal. App. 612, 100 Pac. 130.

11. Meeker v. Spencer, 41 Cal. App. 400.

12. Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547.

13. Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

deed shall be considered as completely executed and the title conveyed are sufficient.[14] Actual manual tradition or change of possession of the deed, however, is not required.[15] Thus, where an incomplete delivery has been made by depositing the deed with a third person to be delivered to the grantee on condition, the grantor may subsequently intend that the deed shall be absolutely delivered without power of revocation on his part, and may express this intent to the grantee under such circumstances as to perfect the delivery.[16] The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another, and when it appears that the transaction has been so far executed or completed, that the parties must have understood that the grantor was divested of title, and the grantee was invested with it, though the instrument still remains in the hands of the grantor.[17] And this general principle governing constructive delivery is enunciated by the code.[18] In determining the legal effect of a transaction purporting to be a formal delivery of a deed, the acts of the parties in dealing with it, following

14. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

15. Civ. Code, § 1059; see supra, § 51; Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Carr v. Howell, 154 Cal. 372, 97 Pac. 885 (holding the principle equally applicable to any contract); Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; Hastings v. Vaughn, 5 Cal. 315; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661 (at least as between the parties); McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948. Delivery to third person for benefit of grantee, see infra, § 65 et seq.

16. Moore v. Trott, 162 Cal. 268, 122 Pac. 462 (holding it not necessary that the depositary should have notice of the new, changed and executed intent of the grantor).

17. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Moore v. Trott, 162 Cal. 268, 122 Pac. 462.

18. Civ. Code, § 1059. See supra, § 41.

such formal delivery, are to be construed therewith, so far as they form with the formal act, parts of one continuous occurrence. But where they are purely the result of afterthought, they cannot alter or modify the legal effect of the prior completed delivery.[19] While the assent of the grantee, of course, is necessary to consummate the delivery,[20] an explicit declaration of acceptance is not required. Any act which manifests such assent, as the receipt and retention of the deed,[1] or such other circumstances as will raise a presumption of his acceptance, are sufficient.[2]

§ 57. Retention of Possession.—While it is recognized that a grantor may make constructive delivery of a deed, without actually parting with its possession,[3] or while it is in the possession of a third person,[4] and that he may do so by acts or words, or both, manifesting an intention to presently divest himself of the title,[5] still there must be a plain showing of such intention.[6] The mere declaration of the grantor to the grantee that he had deeded the

19. Stone v. Daily, 181 Cal. 571, 95.

20. See supra, § 49.

1. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803.

2. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Civ. Code, § 1059. See supra, § 51. Benefit to grantee as raising presumption of acceptance, see infra, § 75. Recording not necessary to a valid conveyance, see infra, § 91.

3. Civ. Code, § 1059. See supra, § 51. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Carr v. Howell, 154 Cal. 372, 97 Pac. 885 (holding principle equally applicable to any contract); Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; Hastings v. Vaughn, 5 Cal. 315; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

4. Moore v. Trott, 162 Cal. 268, 122 Pac. 462.

The delivery of a trust deed in the nature of a covenant to stand seised for the benefit of the children of the grantor, in which the grantor was named as one of the grantees, was held established by the recording of the deed and its recognition as vesting title in the grantees in trust, although the grantor never parted with its possession. Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790.

5. See supra, § 56.

6. Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708.

property to him, while he yet retained possession of the deed, has no efficacy to establish the delivery of the deed.[7] Possession by the grantor is presumptive though rebuttable evidence that the deed was never delivered.[8] And so, where a husband made a deed in favor of his wife, which was found after his death in a place where he kept all his papers, it has been held that no delivery was shown where the wife had no knowledge until after the husband's death, of the existence of such deed.[9] However, it is not always an essential of delivery that the grantee have knowledge of the existence of a deed executed to him, or that he formally accept the same. Acceptance of a deed may be presumed under certain circumstances.[10]

§ 58. **Retention of Control.**—To complete a valid delivery of a deed, the grantor must give up all power of control and dominion over it,[11] and without reserving any right to recall or revoke it,[12] in any event and for all

7. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800.

8. See infra, § 74.

9. Ostrom v. De Yoe, 4 Cal. App. 326, 87 Pac. 811.

10. See supra, § 49.

11. (1) Cases of direct delivery to grantee: Kenney v. Parks, 137 Cal. 527, 70 Pac. 556; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782. (2) Cases of delivery to third person for benefit of grantee: Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Moore v. Trott, 162 Cal. 268, 122 Pac. 462 (decision on first appeal, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578); Moore v. Donovan, 158 Cal. 376, 111 Pac. 1100 (same facts as, and decided on authority of, Moore v. Trott, supra); Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Canale v. Copello, 137 Cal. 22, 69 Pac. 698; Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Fitch v. Bunch, 30 Cal. 208; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664.

12. (1) Cases of direct delivery to grantee: Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Ord v. Ord, 99 Cal. 523, 34 Pac. 83; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479; Melvin v. Melvin, 8 Cal. App.

time.[13] There must be no condition attached to the delivery whereby the grantor may again obtain control.[14] In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument, and upon the happening of some event, or contingency, or condition, he had the right, if so disposed, to reach out and take it.[15] When the cases speak of the necessity of the control of the instrument passing from the grantor, they mean control in the sense of power to recall it, control over it as an effective instrument of conveyance, not in the sense of having the mere physical custody of it.[16] This question is one of intention to be gathered from all of the surrounding circumstances,[17] and is one phase or

684, 97 Pac. 696; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806. (2) Cases of delivery to third person for benefit of grantee: Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898; Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Long v. Ryan, 166 Cal. 442, 137 Pac. 29; Estate of Cornelius, 151 Cal. 550, 91 Pac. 329; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; McCord v. Maddux, 36 Cal. App. Dec. 450, 202 Pac. 459; Heitman v. Bruns, 37 Cal. App. 489, 174 Pac. 67; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

13. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Long v. Ryan, 166 Cal. 442, 137 Pac. 29; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479.

14. Long v. Ryan, 166 Cal. 442, 137 Pac. 29.

15. Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

16. Stone v. Daily, 181 Cal. 571, 185 Pac. 665.

17. Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 8 Pac. 46; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

aspect of the general subject of intention as applied to delivery.[18]

§ 59. **Rule of Control Applied.**—A frequent instance of the intent of the grantor to divest himself completely of control or dominion over the deed being made the test of a complete and valid delivery is where the deed was placed in the possession of the grantee,[19] or was deposited where it was accessible to both parties,[20] with the understanding that it should remain under the grantor's control during his life, and if not previously withdrawn or destroyed, should become operative in the event of the grantor's death before that of the grantee, but in the event of the grantee's prior death it should be inoperative. In such cases there is no intent that the deed should operate, or that the title should vest, except in a certain event, and the right is reserved to the grantor to withdraw or destroy the deed in the meantime.[1] In other words, there is no delivery in any legal sense.[2] These cases, however, are to be distinguished from other and similar cases where the manual tradition of the deed was accompanied with the intent that the deed should have a present legal and operative effect. In the latter instances the deed is deemed to have been delivered conditionally, and by force of section 1056 of the Civil Code is held to have taken effect discharged of the condition.[3] The application of the principles enunciated here and in the preceding section is more frequently found in in-

18. See supra, §§ 52–55.

19. Kenney v. Parks, 137 Cal. 527, 70 Pac. 556; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782; Melvin v. Melvin, 8 Cal. App 684, 97 Pac. 696.

20. Miller v. Brode, 186 Cal. 409, 199 Pac. 531; Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782; Elliott v. Merchants' Bank etc. Co., 21 Cal. App. 536, 132 Pac. 280.

1. Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782; Melvin v. Melvin, 8 Cal. App. 684, 97 Pac. 696.

2. See cases cited supra.

3. See infra, § 60.

stances of the delivery to a third person for the benefit of the grantee, and is considered in a subsequent section.[4]

§ 60. Effect of Direct Delivery to Grantee in General.— The code provides that

"A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."[5]

This principle is well fortified by judicial decisions.[6] Hence, if an instrument is delivered to the grantee as the present deed of the grantor it becomes freed from any condition not expressed in the deed itself,[7] and operates by vesting title immediately without any reference to the performance of the conditions, although such result may be contrary to the express stipulation of the parties.[8] Apart from the elementary rule interdicting the modification or varying of the vital terms of a writing by parol,[9] any attempt to restrict or enlarge the scope or effect of an instrument transferring real property by an oral stipulation is prohibited by the statute of frauds.[10] Hence, whether a deed, when delivered, shall take effect absolutely, or upon the performance of some condition not ex-

4. See infra, § 71.

5. Civ. Code, § 1056.

6. Eells v. Eells, 175 Cal. 127, 165 Pac. 441; Treat v. Treat, 170 Cal. 329, 150 Pac. 53, 57; Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Dimmick v. Dimmick, 95 Cal. 523, 30 Pac. 547; Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Avery v. Avery, 42 Cal. App. 100, 183 Pac. 453; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Fisher v. Fisher, 23 Cal. App. 310, 137 Pac. 1094; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331; Elliott v. Merchants B. & T. Co., 21 Cal. App. 536, 132 Pac. 280; Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156 (holding the rule equally applicable to transfers generally).

7. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331; Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156. See, also, cases cited supra.

8. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331.

9. See EVIDENCE.

10. Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331. See Code Civ. Proc., § 1971.

pressed therein, cannot be determined by parol evidence.[11] Any condition qualifying the delivery must be inserted in the deed itself, or else the deed must not be delivered to the grantee;[12] for a deed cannot be delivered in escrow to the grantee, but only to a third person.[13] It follows from the principles above stated that acceptance of a deed by the grantee binds him to any conditions upon which the delivery was made.[14]

§ 61. Examples of Conditional Delivery to Grantee.— Where a deed is absolute on its face and is delivered to the grantee, a parol stipulation that it should not be recorded until the happening of some future event, such as the grantor's death, does not militate against the sufficiency of the delivery,[15] or prevent the title from vesting in the grantee.[16] Such a stipulation being inconsistent with the instrument itself, and the delivery being governed by section 1056 of the Civil Code, the deed becomes absolute and final.[17] And where a delivery to the grantee is upon a condition which may, according to the outcome, make the transfer effective or nugatory, the condition is by the law discarded, and the delivery is regarded as absolute.[18] A life estate or interest cannot be reserved

11. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331; Elliott v. Merchants' B. & T. Co., 21 Cal. App. 536, 132 Pac. 280; Albert v. Albert, 12 Cal. App. 268, 107 Pac 156.

12. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331.

13. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17. Deed distinguished from escrow, see infra, § 69. See ESCROW.

14. Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Simons v. Bedell, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3.

15. Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

16. Eells v. Eells, 175 Cal. 127, 165 Pac. 441; Treat v. Treat, 170 Cal. 329, 150 Pac. 53, 57; Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547; Avery v. Avery, 42 Cal. App. 100, 183 Pac. 453; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331.

17. See supra, § 60.

18. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17 (holding findings were

to the grantor in this manner.[19] Nor, will a mere request by the grantor not to record the deed, though in writing, create any interest in the grantor, where the deed is absolute.[20] It has been held, however, that such a qualified delivery may, under special circumstances, impress the title with an equitable life estate in favor of the grantor, and to that extent constitute the grantee a trustee.[1] Similarly, a deed delivered to the grantee with the understanding that it should not take effect except in the event of the grantor's death,[2] or in the event of the death of the grantor before that of the grantee,[3] if absolute in form, vests the title in the grantee, and cannot be defeated by parol proof of the condition upon which the delivery was made. Even if the grantor has no other purpose than to avoid administration of his estate, and intends that the deed shall not take effect at all except in case of his death, and should then operate in lieu of a will, yet, if it is delivered to the grantee, and is an absolute deed, it cannot have an effect different from that apparent on its face, and in legal effect vests the title in the grantee free from conditions.[4] And though the grantor erroneously believes that if the grantee should die first, he could revest title in himself by concealing or destroying the deed, this does

insufficient to support conclusion of delivery); Elliott v. Merchants' B. & T. Co., 21 Cal. App. 536, 132 Pac. 280 (stating the rule but holding there was no delivery in this instance); Fisher v. Fisher, 23 Cal. App. 310, 137 Pac. 1094 (on the question of the sufficiency of a pleading to show nondelivery of a deed, it was held that the allegations showed "that there was some sort of a delivery of the instrument, qualified or otherwise," to the grantee, hence the delivery was absolute, certain conditions attached thereto being discharged).

19. Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331. See, also, cases cited supra, this section, and see infra, § 70.

20. Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331.

1. Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13. As to circumstances generally constituting the grantee a constructive trustee of the title, see TRUSTS.

2. Bias v. Reed, 169 Cal. 33, 145 Pac. 516.

3. Hammon v. McCollough, 159 Cal. 639, 115 Pac. 216.

4. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17 (approved in Hammond v. McCullough, supra).

not militate against the effectiveness of the delivery, or destroy a clear intention to part with the title.[5]

A familiar instance of the delivery of deeds, whose operative effect is intended to depend upon the survivorship of the grantee, is where persons execute deeds, each to the other, which are either to be destroyed or placed of record according as the one or the other should happen to die first. Such deeds are usually intended to avoid the delay and expense of probate, and to give effect to an apparent title of record by the destruction of a deed and the suppression of other evidence, namely, by the silence of the grantor, and are therefore not favored.[6]

§ 62. Repossession After Delivery.—While a deed prior to its actual delivery is subject to the control and disposition of the grantor,[7] it is a firmly established legal principle that upon a completed delivery the deed becomes an executed conveyance,[8] and cannot thereafter be impaired by any act of the grantor.[9] Hence, a delivery cannot be rendered ineffective by the grantor subsequently reclaiming and retaining possession of the deed,[10] whether for the purpose of its safekeeping,[11] or to prevent the grantor encumbering the property conveyed,[12] or to insure its not being placed of record until after the grantor's death,[13] or even for the purpose of destroying it or nullifying its

5. Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547 (approved in Hammond v. McCollough, supra). See infra, § 62; and compare infra, § 95.

6. Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216 (case of reciprocal deeds executed by husband and wife, each upon the above condition).

7. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867. See, also, supra, § 57, and infra, § 71.

8. See infra, § 84.

9. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471. And see infra, § 95.

10. See cases cited infra, this section.

11. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Follmer v. Rohrer, 158 Cal. 755, 112 Pac 544; McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

12. Holmes v. O'Brien, 28 Cal. App. 264, 151 Pac. 1151.

13. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551.

effect.[14] A fortiori, the placing of the deed after delivery where the grantor, equally with the grantee, has access to it, does not change its legal effect as a conveyance.[15] In short, it is immaterial what becomes of the deed after its effectual delivery.[16] Accessibility of the deed to both parties, however, may be some evidence to be considered upon the question of whether it has or has not been delivered.[17] And the fact that possession of the deed has been reclaimed by the grantor after its ostensible delivery may be evidence that there was no intent to make an absolute delivery.[18]

§ 63. Redelivery and Ratification.—It has been seen that after an effectual delivery has been made, it is immaterial what is thereafter done with the deed.[19] Hence the reclaiming possession by the grantor of a delivered deed and its redelivery to a third person for a collateral purpose,[20] or the fact that the grantee again procures possession of the deed by surreptitious means,[1] has no effect upon the prior delivery. But a second delivery may be made under circumstances tending to negative the intent to make a prior delivery.[2] Thus, where the grantor de-

14. Eells v. Eells, 175 Cal. 127, 165 Pac. 441; Estate of Cornelius, 151 Cal. 550, 91 Pac. 329; King v. Fragley, 19 Cal. App. 735, 127 Pac. 813.

15. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Reed v. Smith, 125 Cal. 491, 58 Pac. 139.

16. King v. Fragley, 19 Cal. App. 735, 127 Pac. 813. See, also, infra, § 95.

17. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803.

18. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

19. See supra, § 62; and compare infra, § 95.

20. Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661; Holmes v. O'Brien, 28 Cal. App. 264, 151 Pac. 1151; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551.

1. Eells v. Eells, 175 Cal. 127, 165 Pac. 441.

2. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661; Holmes v. O'Brien, 28 Cal.

livered the deed to the grantee with the request not to record it, and subsequently took it back and delivered it to a third person with a similar request, it was held, under the circumstances, to warrant the inference that the intent necessary to make a legal delivery in either instance was lacking.[3] Likewise, where, after a formal delivery to the grantee, the deed was deposited with a third person with instructions signed by both parties to deliver to the survivor of them on demand, it was held that both acts constituted one transaction and should be construed together, and thus construed the first delivery was qualified and limited by the second delivery to the depositary.[4] Where an escrow has been abandoned by the parties,[5] or the delivery of the deed to a depositary for the grantee has been incomplete,[6] the grantor may make a new, independent and complete delivery. But a deed that is void for want of delivery cannot be validated by a subsequent deed given for that purpose. That is, the execution and delivery of a second deed cannot constitute a delivery of the first.[7] If the second delivery is sufficient, any question as to the validity or sufficiency of the first delivery becomes immaterial.[8]

§ 64. Necessity of Delivery in Grantor's Lifetime.— While the operation of a deed may be somewhat restricted by limitations predicated upon the grantor's death, as where the grantor's use and enjoyment of the premises is postponed until that event,[9] the actual delivery of the deed as an effectual and final disposition of the property[10]

App. 264, 151 Pac. 1151; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551.

3. Rice v. Carey, 170 Cal. 748, 151 Pac. 135.

4. Stone v. Daily, 181 Cal. 571, 185 Pac. 665. As to conditional delivery generally, see supra, § 58.

5. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931. See ESCROW.

6. Moore v. Trott, 162 Cal. 268, 122 Pac. 462.

7. Barr v. Schroeder, 32 Cal. 609. Compare infra, § 93.

8. Tedford v. Eichler, 162 Cal. 214, 121 Pac. 730; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479.

9. See infra, § 70.

10. See supra, § 50.

must take place during the lifetime of the grantor.[11] The law does not permit a testamentary disposition of property by deed.[12] If a deed is intended to take effect only upon the grantor's death it is testamentary in character, and unless it is testamentary in form, i. e., executed as required by the law of wills, it cannot be given effect,[13] and is therefore void.[14] The fact in such cases that the grantor dies believing that he has accomplished his purpose is unavailing; a technical but inflexible rule of law governing the transfer of real property prevents his intention from being carried out.[15] Hence a deed delivered and recorded after the death of the grantor,[16] even though pursuant to the grantor's prior instructions,[17] is ineffectual as a conveyance. But if the act of delivery was completed during the life of the grantor, as for instance where the deed was deposited with a third person for the grantee, it is none the less effective because, through the forgetfulness of the depositary, it was not actually delivered to the grantee until after the grantor's death.[18]

11. Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; Huntley v. San Francisco Savings Union, 130 Cal. 46, 62 Pac. 255; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Nelson v. Thomas, 36 Cal. App. 433, 172 Pac. 398. And see other cases cited infra, this section.

12. Green v. Skinner, 185 Cal. 435, 197 Pac. 60 (applying rule to a deed by one of two joint tenants); Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

13. Hunt v. Wicht, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; McCord v. Maddux, 36 Cal. App. Dec. 450, 202 Pac. 459; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120. For distinction between a deed and a will, see supra, §§ 9, 10. See generally, WILLS.

14. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

15. Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578.

16. Long v. Ryan, 166 Cal. 442, 137 Pac. 29; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578 (opinion on second appeal, 162 Cal. 268).

17. Long v. Ryan, 166 Cal. 442, 137 Pac. 29.

18. Crozier v. White, 9 Cal. App. 612, 100 Pac. 130; Neely v. Buster,

Nor can a deed be made the subject of a testamentary disposition so as to make it operative as a conveyance. Thus, a provision in a will that certain deeds signed and acknowledged should go to the grantee therein named has no effect upon the title of the property described in the deeds.[19] That the purpose on the part of the grantor in executing a deed was to avoid the necessity of administration on his estate does not necessarily stamp the transaction as testamentary in character.[20] Nor is it to be presumed that a deed executed by a grantor on what he knew was his deathbed, and in view of that circumstance, was in the nature of a gift causa mortis, or that it was intended as a last will and testament, and hence was inoperative.[1]

Delivery to Third Person.

§ 65. General Rule.—A grant, without actual delivery into the possession of the grantee, may be delivered constructively by delivery to a third person for the grantee,[2]

34 Cal. App. Dec. 183, 195 Pac. 736. Compare infra, § 70.

19. Estate of Young, 123 Cal. 337, 55 Pac. 1011.

20. Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898; Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Ellis v. Funk, 32 Cal. App. 426, 163 Pac. 332.

1. Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599. See GIFTS.

2. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837; Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13; Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Hunt v. Wicht, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639; Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483 (where it was stated that the reclaiming and retaining possession of the deed by grantor showed an intention not to deliver); Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703, 151 Pac. 1; Long v. Ryan, 166 Cal. 442, 137 Pac. 29; Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578, on second appeal, 162 Cal. 268 (where the grantor made a second and independent delivery to the grantee); affirmed in Merritt v. Barta, 158 Cal. 376, 111 Pac. 259; Cornelius, Estate of, 151 Cal. 550, 91 Pac.

as where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed.[3] Thus, where the depositary of a deed in the presence of the grantor and grantee told the former that he could not at that time get the "papers" which he desired to give to the latter, and the grantees requested the depositary to keep them for her, it was held, upon the presumption that the grantor assented to that arrangement, that eo instanti there was a delivery of the deed to the grantee.[4] The grantee's assent is not required at the moment of

329; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Wilhoit v. Salmon, 146 Cal. 444, 80 Pac. 705; Canale v. Copello, 137 Cal. 22, 69 Pac. 698 (applying rule to assignment of lease); Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Simons v. Bedell, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Corker v. Corker, 95 Cal. 308, 30 Pac. 541; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Fitch v. Bunch, 30 Cal. 208; City Lumber Co. v. Brown, 31 Cal. App. Dec. 844, 189 Pac. 830; Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812; Coward v. De Cray, 38 Cal. App. 290, 176 Pac. 56 (applying the rule to gifts of personal property); Heitman v. Bruns, 37 Cal. App. 489, 174 Pac. 67; Nelson v. Colton, 36 Cal. App. 69, 171 Pac. 701; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479 (but holding there was a second effective delivery to the grantee); Holmes v. O'Brien, 28 Cal. App. 264, 151 Pac. 1151; Gernon v. Sisson, 21 Cal. App. 123, 131 Pac. 85; Sears v. Douthitt, 18 Cal. App. 774, 124 Pac. 453; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892 (deed deposited with third person without the consent and against the wishes of the grantor); Crozier v. White, 9 Cal. 612, 100 Pac. 130; Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664; Clint v. Eureka Crude Oil Co., 3 Cal. App. 463, 86 Pac. 817 (in concurring opinion of Smith, J.); Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120 (holding that the reclaiming and retaining of possession by the grantor showed no intention to deliver).

3. Civ. Code, § 1059, subd. 2. See supra, § 51; Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; Hibberd v. Smith, 1 Cal. Unrep. 554. See supra, § 49, as to necessity for acceptance generally; and infra, § 75, as to benefit as showing acceptance.

4. Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736.

delivery to the third person, but may be given subsequently,[5] and even after the death of the grantor,[6] the deed taking effect by relation, provided the rights of third persons have not intervened.[7] But in the absence of a legal presumption of acceptance, there can be no acceptance by the grantee until he has knowledge of the deed,[8] the question in such case being not what the grantee would have done, had he known of the deed, but what he has done.[9] The essential requisite to the validity of a deed delivered to a third person, as to the grantee, is that it has passed beyond the power of the grantor for all time, and that question is to be determined by the grantor's intention in the matter, and is a question of fact to be solved by the light of all the circumstances surrounding the transaction.[10] While a deed cannot be delivered conditionally to the grantee,[11] it may be delivered conditionally to a third person, in which case it is either a deed absolute, or an escrow.[12]

§ 66. Capacity and Authority in General.—No delivery of a deed for the benefit of a grantee can be made to a third person as the mere custodian or agent of the grantor.[13] If delivery is so made by the grantor, the de-

5. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46 (different case with same title and same facts in 1 Cal. Unrep. 554).

6. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; Crozier v. White, 9 Cal. App. 612, 100 Pac. 130.

7. See infra, § 87.

8. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

9. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

10. Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300, (see generally, supra, §§ 50–52).

11. See § 60, supra.

12. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931. See, generally, § 69, infra, and see ESCROW.

13. Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Huntley v. San Francisco Savings Union, 130 Cal. 46, 62 Pac. 255; Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Fitch v. Bunch, 30 Cal. 208.

positary becomes the agent and custodian of the grantee,[14] or his trustee,[15] for the purpose of delivery, and the delivery is complete, subject, of course, to the rule making the acceptance by the grantee one of the elements of a complete delivery.[16] Upon an analogous principle, if a deed is delivered to the grantee's agent, but the delivery is not absolute, and the deed remains subject to the grantor's control, to this extent the depositary is made the agent of the grantor,[17] and if he delivers the deed to the grantee without the grantor's authority, in the absence of any element of estoppel,[18] it is inoperative.[19] Thus, a deed executed in favor of a bank and handed to one of its directors with instructions not to deliver it until certain matters in dispute were settled,[20] and a deed to the grantee's agent with instructions not to give it to the grantee until it had first been shown to and approved by the grantors' attorney,[1] were not delivered in any legal sense. Obviously, if the grantee consents or agrees that the deed may be left with a third person for him, the delivery to the latter is equivalent to a direct delivery to

14. Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837; Carr v. Howell, 154 Cal. 372, 97 Pac. 885 (applying the rule to contract); Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46 (acceptance of the grantee necessary to make a present complete delivery was here lacking); Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; Nelson v. Coulton, 36 Cal. App. 69, 171 Pac. 701; Gernon v. Sisson, 21 Cal. App. 123, 131 Pac. 85.

15. See infra, § 70.

16. See supra, § 50.

17. Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664; Clint v. Eureka Crude Oil Co., 3 Cal. App. 463, 86 Pac. 817.

18. See ESTOPPEL.

19. Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Fitch v. Bunch, 30 Cal. 208; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664. See generally, PRINCIPAL AND AGENT.

20. Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106 (holding also that power to accept the deed in this instance was a function of the board of directors, and not of any individual director or officer).

1. Clint v. Eureka Crude Oil Co., 3 Cal. App. 463, 86 Pac. 817.

the grantee.[2] But one cannot effect a delivery by accepting and recording a deed as the assumed agent of the grantee, while acting in his own interest, and without the knowledge or consent of the grantee or his subsequent approval.[3] The fact that the third person, acting as the depositary of the deed, occupies a confidential relation to the grantor, such as attorney[4] or confidential clerk[5] or agent,[6] is not in itself a legal objection to the sufficiency of such a delivery. A manual delivery to the grantee made by the officer taking the acknowledgment, without any qualifying act or word on the part of the grantor, may under some circumstances constitute a sufficient delivery.[7]

§ 67. Instructions to Depositary.—In determining the nature and effect of a delivery to a third person for the grantee, the courts here as elsewhere seek to give effect to the intention of the parties,[8] and accordingly have given the word "deliver" as used in written instructions to the depositary, the general meaning of transmit,[9] and the expression "then to take effect" has been construed as referring not to the vesting of title, but to the time of enjoyment of the property.[10] It is not essential to the

2. City Lumber Co. v. Brown, 31 Cal. App. Dec. 844, 189 Pac. 830; Sears v. Douthitt, 18 Cal. App. 774, 124 Pac. 453; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106.

3. Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897.

4. Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898; Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736 (inferential).

5. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1 (inferential).

6. Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837.

7. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Harris v. Harris, 59 Cal. 620. But see Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782, in which a similar delivery was held ineffective.

8. See supra, § 52.

9. Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812.

10. Smith v. Smith, 173 Cal. 725, 161 Pac. 495.

rights of either the grantor or the grantee that the depositary should be fully informed as to the agreement pursuant to which the deposit was made, and failure to inform him, therefore, does not preclude proof of the intention of the parties.[11] But where the grantor's instructions to the depositary are entirely in writing, the effect of the transaction depends upon the construction of the writing as a matter of law.[12]

§ 68. Termination and Ratification of Authority.—In consonance with familiar principles governing the relation of principal and agent, if the delivery is qualified and not absolute, and the grantor dies,[13] or the depositary's authority is revoked,[14] before the final delivery as authorized, the authority is terminated and a subsequent delivery is ineffective.[15] But it has been held that if the delivery to the depositary was legally complete, the fact that through the agent's forgetfulness the deed was not delivered until after the grantor's death did not militate against the sufficiency of its delivery, though the grantor had intended an immediate delivery.[16] If the depositary was not previously authorized to accept the deed on behalf of the grantee, the latter may subsequently ratify the act by an actual acceptance,[17] or by treating the depositary as a trustee,[18] or by the exercise of rights thereby conferred. In case of ratification the

11. Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; and see infra, § 79.

12. Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578.

13. Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304.

14. Fitch v. Bunch, 30 Cal. 208.

15. See, generally, AGENCY, vol. 1, p. 703.

16. Crozer v. White, 9 Cal. App. 612, 100 Pac. 130; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736.

17. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Hibberd v. Smith, 67 Cal. 547, 56 Am. St. Rep. 726, 4 Pac. 473, 8 Pac. 46; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736.

18. Nelson v. Colton, 36 Cal. App. 69, 171 Pac. 701; and see infra, § 70.

full title is deemed to have passed at the time of the delivery to the depositary by the fiction of relation.[19]

§ 69. Nature of Deposit—Distinguished from Escrow. A deed may be delivered by the grantor either as a deed absolute, or as an escrow.[20] A grant deposited with a third person to be delivered to the grantee upon performance of a condition is called an escrow.[1] It differs from a deed in one particular only, and that is the delivery. In all other respects they are the same.[2] Such a deposit cannot be made with the grantee, but only with a third person,[3] and under the general rule prescribed by section 1057 of the Civil Code, no title passes until the condition is performed,[4] or so far performed that the grantee is entitled to the possession of the deed,[5] and generally not until its second delivery.[6] An exception to this rule is where the condition is certain to occur regardless of any act of the parties,[7] such as the death of the grantor, in which case the title passes at the time of the deposit of the deed.[8] The exception results unavoidably from the

19. Nelson v. Colton, 36 Cal. App. 69, 171 Pac. 701; and see infra, § 87. As to effect of ratification by principal generally see AGENCY, vol. 1, p. 766, et seq.

20. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931.

1. Civ. Code, § 1057, reads: "A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in possession of the third person, and subject to condition, it is called an escrow." See ESCROW.

2. Miller v. Sears, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589; Fitch v. Bunch, 30 Cal. 208.

3. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; and see infra, § 60.

4. Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; Fitch v. Bunch, 30 Cal. 208; Dyson v. Bradshaw, 23 Cal. 528; Beem v. McKusick, 10 Cal. 538.

5. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931.

6. Fitch v. Bunch, 30 Cal. 208.

7. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338. See, also, Holland v. McCarthy, 173 Cal. 597, 160 Pac. 1069, in which the distinction is also recognized.

8. See infra, § 70.

certainty of the event upon which the second delivery is made to depend, and the impossibility under the circumstances that the grantor would ever be able to recall or possess himself of the deed;[9] but it does not apply where the fulfillment of the condition is uncertain, as, for instance, where the grantee has some causative function in respect to the happening of the future event.[10] While the delivery of a grant as an escrow, as in the case of the delivery of a deed,[11] requires that the grantor part with all control or dominion over it,[12] in the case of the escrow it is the binding force of the agreement between the parties which makes the deposit irrevocable until the performance of the condition.[13] Hence, it is, that upon breach of the condition,[14] or upon the mutual abandonment of the escrow,[15] the grantor is entitled to recover his deed.[16] A delivered deed, on the other hand, is a completed transaction presently passing the title,[17] which cannot be revested in the grantor except by a reconveyance.[18] Consequently, a deed deposited with a third person which remains subject to the order of control of the depositor is neither a deed nor an escrow.[19]

9. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

10. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Holland v. McCarthy, 173 Cal. 597, 160 Pac. 1069.

11. See infra, § 71, and supra, §§ 58, 60.

12. Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Fitch v. Bunch, 30 Cal. 208.

13. Holland v. McCarthy, 173 Cal. 597, 160 Pac. 1069; Miller v. Sears, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589; Fitch v. Bunch, 30 Cal. 208. See, also, 5 Cal. Law Rev., 420.

14. Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; Dyson v. Bradshaw, 23 Cal. 528; Beem v. McKusick, 10 Cal. 538.

15. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931.

16. See, generally, ESCROW.

17. See infra, § 84.

18. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; and see, generally, infra, § 95.

19. Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Miller v. Sears, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589; Fitch v. Bunch, 30 Cal. 208.

§ 70. Deposit for Delivery After Grantor's Death.—A deed in the form of an absolute, unconditional conveyance which is delivered by the grantor to a third person, to be delivered to the grantee on the death of the grantor, with the intention on his part of making the delivery absolute and placing it beyond his power thereafter to revoke or control, has the effect of vesting the legal title at once in the grantee,[20] with a tenancy for life reserved

20. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Stone v. Daily, 181 Cal. 571, 185 Pac. 665 (stating rule, but holding the intent to pass a present title was lacking); Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931 (where the delivery was incomplete, being subject to conditions to be performed by the grantee); Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13; Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800 (where the deed was subsequently withdrawn and it was held that there was no delivery); Hunt v. Wicht, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639 (holding intention to pass present title was lacking); Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Rice v. Carey, 170 Cal. 748, 151 Pac. 135 (holding no intent to pass present title); Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1 (holding no intent to pass present title); Long v. Ryan, 166 Cal. 442, 137 Pac. 29; Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231 (holding the title could not be limited or otherwise affected by a subsequent parol agreement between the grantor and the grantee); Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578 (where the delivery was ineffective because conditional); Moore v. Donovan, 158 Cal. 376, 111 Pac. 1100 (decided upon same facts as Moore v. Trott, supra); Estate of Cornelius, 151 Cal. 550, 91 Pac. 329; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304 (where the delivery was ineffective because conditional); Wilhoit v. Salmon, 146 Cal. 444, 80 Pac. 705; Canale v. Copello, 137 Cal. 22, 69 Pac. 698 (applying rule to assignment of lease); Howlin v. Castro, 136 Cal. 605, 69 Pac. 432 (delivery ineffective because conditional); Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298; Huntley v. San Francisco Savings Union, 130 Cal. 46, 62 Pac. 255 (but holding that the intent to presently vest title was lacking); Kenney v. Parks, 125 Cal. 146, 57 Pac. 772 (holding there was no intent to pass present title); Simons v. Bedell, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338 (McFarland, J., dissenting, on the ground that the depositary was merely the agent of the grantor to make delivery after the grantor's death, and that his authority so to do was terminated by the latter event); McCord v. Maddux, 36 Cal. App. Dec. 450, 202 Pac. 459; Coward v. De Cray, 38 Cal. App. 290, 176 Pac. 56 (ap-

to the grantor, the third person being constituted a trustee of the deed for the grantee.[1] This is an exception to the general rule governing escrows, in which title does not ordinarily pass until the condition is performed.[2] There are well-considered decisions in other jurisdictions holding that, though the grantor has reserved the right to recall the deed, yet if he dies, without recalling it, and the deed is delivered, such delivery is complete and carries title; but California courts have expressly refused to indorse that doctrine.[3] The real question, as determined by the California courts, is as to the power of the grantor to revoke or recall his deed, not whether he has done so.[4] The essential element of the meeting of the minds of the parties necessary to make the delivery complete and oper-

plying the rule to gifts of personal property); Heitman v. Bruns, 37 Cal. App. 489, 174 Pac. 67 (held no delivery because made conditionally); Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252 (holding the title so conveyed was such as would pass by operation of law to grantee's trustee in bankruptcy); Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120 (held no delivery because subject to grantor's control).

1. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13; Hunt v. Wicht, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578 (approved in Moore v. Donovan, 158 Cal. 376, 111 Pac. 1100); Estate of Cornelius, 151 Cal. 550, 91 Pac. 329; Wilhoit v. Salmon, 146 Cal. 444, 80 Pac. 705 (holding that the deed having expressly included with the land conveyed, the "rents, issues and profits thereof," had the effect of divesting the grantor of the right to emblements incident to her life estate); Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; McCord v. Maddux, 36 Cal. App. Dec. 450, 202 Pac. 459; Coward v. De Cray, 38 Cal. App. 290, 176 Pac. 56 (applying the rule to a gift of personal property); Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252.

2. See supra, § 69. As to creation of future estates by deed, see infra, §§ 147 149. See ESCROW.

3. Long v. Ryan, 166 Cal. 442, 137 Pac. 29; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Canale v. Copello, 137 Cal. 22, 69 Pac. 698; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

4. Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

ative,[5] is here supplied by the fiction of relation, and on this principle, where the delivery is unqualified and absolute, the title passes as of the date of the delivery to such third person.[6] If the delivery to the depositary is further qualified or conditioned so as to make the ultimate delivery of the deed uncertain, it is deemed to be still under the control of the grantor and there is no effective delivery.[7] And an intention that the deed shall not take effect until the death of the grantor makes it testamentary in character and therefore void.[8]

§ 71. Retention of Control—Rule Applied.—The general principles involved in the retention of control of a deed by the grantor as affecting its delivery have been stated in a preceding section,[9] and are here specifically applied to cases of delivery to a third person for the benefit of the grantee. A certain element of control may remain in the grantor precluding an operative delivery, as where a deed was left with a third person to be delivered on the order of the grantor's agent,[10] or after the grantor had made certain investigations;[11] or where it was to be delivered, upon the death of the grantor, unless previously called for by him;[12] or in the event the grantor failed to satisfy certain claims of the grantee;[13] or unless the grantor survived a certain date;[14] or sur-

5. See supra, § 50.

6. See infra, § 84.

7. See supra, §§ 58, 70. And compare supra, § 60. As to the distinction between deed and escrow, see supra, § 69.

8. Hunt v. Wicht, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639 (but holding there was a valid delivery in this instance, the court saying that the grantor's "death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow"). See, generally, supra, § 64.

9. See supra, § 58.

10. Fitch v. Bunch, 30 Cal. 208.

11. Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664.

12. Heitman v. Bruns, 37 Cal. App. 489, 174 Pac. 67.

13. Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304.

14. Long v. Ryan, 166 Cal. 442, 137 Pac. 29 (the delivery being held ineffective though the grantor died before the date specified, and

vived a certain event, such as a surgical operation,[15] or a period of sickness.[16] Similarly, it has been held that there was no delivery where a deed was deposited with a third person merely to secure the grantee pending his performance of an agreement to support the grantor during his life;[17] or where the depositary was directed not to deliver it to either party without the consent of the other, and in the event of the prior death of the grantor to deliver it to the grantee;[18] or where the attorney taking the acknowledgment retained the deed as the assumed depositary for the grantee against the will of the grantor;[19] or where the final delivery by the depositary was to be made after the grantor's death, but was conditioned nevertheless, as between the parties, upon the survivorship of the grantee, the deed otherwise to be deemed of no effect.[20] An intention not to part presently with all control over the deed may be inferred from equivocal acts of the grantor, as where, after placing the deed in the manual possession of the grantee, he withdrew it and subsequently kept it in his possession,[1] or deposited it with a third person.[2] But the second delivery to a third person in such case may be explained by showing it to have been made for a purely collateral purpose.[3]

the deed was thereupon delivered to the grantee and recorded).

15. Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578 (on appeal from second trial, 162 Cal. 268, 122 Pac. 462); Moore v. Donovan, 158 Cal. 376, 111 Pac. 1100 (same facts as, and decided on authority of, Moore v. Trott, supra).

16. Canale v. Copello, 137 Cal. 22, 69 Pac. 698.

17. Howlin v. Castro, 136 Cal. 605, 69 Pac. 432.

18. Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304.

19. Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892.

20. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772 (approved in Bias v. Reed, 169 Cal. 33, 145 Pac. 516).

1. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

2. Rice v. Carey, 170 Cal. 748, 151 Pac. 135.

3. Ong v. Cole, 46 Cal. App. 63, 188 Pac. 812; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661; Holmes v. O'Brien, 28 Cal. App. 264, 151 Pac. 1151; Boye v. An-

§ 72. Deeds to Infants.—A deed to an infant requires no personal delivery to or acceptance by the grantee; delivery to a third person for the benefit of the infant is in all cases sufficient to vest title.[4] In other words, if it is for his advantage the law accepts it for him, and will hold the donor bound; but if not for his advantage the law will repudiate it at the instance of the infant, even though he may in terms have accepted it. In this respect the rule at common law and under the civil law is the same.[5] Thus, the delivery of a deed made by a father to his infant son is sufficiently established by proof of its delivery to a notary public, who placed it on record, supported by subsequent declarations of the grantor.[6] The rule results from the presumption of law that a minor is incapable of exercising a sound discretion over his affairs,[7] and from the benignity with which settlements of property by parents upon their minor children, when not in fraud of creditors, are always viewed.[8] In the case of a family settlement the law presumes more in favor of delivery than in other cases.[9]

Presumptions and Evidence.

§ 73. Presumption from Transfer of Deed.—The signing of a deed and the transfer of possession thereof by the grantor to the grantee without other evidence bearing upon the intent—at least where it has been acknowledged—raises a legal presumption of its delivery.[10] The

drews, 10 Cal. App. 494, 102 Pac. 551.

4. Turner v. Turner, 173 Cal. 782, 161 Pac. 980.

5. De Levillain v. Evans, 39 Cal. 120.

6. Turner v. Turner, 173 Cal. 782, 161 Pac. 980.

7. De Levillain v. Evans, 39 Cal. 120. See INFANTS.

8. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

9. McGrath v. Hyde, 3 Cal. Unrep. 98, 21 Pac. 948.

10. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518 (applied to assignment of mortgage); Corker v. Corker, 95 Cal. 308, 30 Pac. 541 (inferentially decided); Shannon v. Aagaard, 45 Cal. App. 733, 188 Pac. 317 (holding that the presumption

acceptance of a deed by the grantee is sufficiently manifest from the delivery and retention of the deed,[11] in accordance with the presumption that things have happened according to the ordinary habits of life.[12] But where the deed has not been delivered directly to the grantee it is requisite to show—if from the particular transaction itself the law does not presume acceptance—[13] that the grantee had notice of the execution in his favor, and proof of such other circumstances as will raise a presumption of his acceptance.[14]

§ 74. Presumption from Possession.—When a deed is regularly signed and acknowledged and is found in the hands of the grantee,[15] or is found among his personal effects after his death,[16] the legal presumption is that it has been duly delivered. And this is especially true

could not be overcome so as to defeat a subsequent bona fide purchaser without showing the deed was obtained by trick or device); Towne v. Towne, 6 Cal. App. 697, 92 Pac. 1050. Compare Code Civ. Proc., § 1963, subd. 8, declaring as a disputable presumption "that a thing delivered by one to another, belonged to the latter."

11. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Barr v. Schroeder, 32 Cal. 609; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661.

12. Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661; Code Civ. Proc., § 1963, subd. 28.

13. See supra, §§ 62–65.

14. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

15. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868; McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279; Reed v. Smith, 125 Cal. 491, 58 Pac. 139; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; Branson v. Caruthers, 49 Cal. 374; Stark v. Barrett, 15 Cal. 361; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806; Fisher v. Fisher, 23 Cal. App. 310, 137 Pac. 1094; Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153; Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512; Bohn v. Gunther, 18 Cal. App. 191, 122 Pac. 981; Towne v. Towne, 6 Cal. App. 697, 92 Pac. 1050; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806; Code Civ. Proc., § 1963, subds. 8 and 28.

16. Kidder v. Stevens, 60 Cal. 414; Cappler v. Cowan, 39 Cal. App. 630, 179 Pac. 526.

where the deed has also been placed of record.[17] Upon the same principle, possession of a deed to a former grantee by one claiming title through him, is prima facie evidence of delivery to such former grantee.[18] Hence, the production of a deed on trial by the attorney of the grantee,[19] or by the opposing party where the deed comes from the possession of the grantee,[20] justifies its reception in evidence without further proof of delivery. While it is always competent to show by parol evidence that a deed has never been delivered, though it is in the grantee's possession,[1] as where it is still subject to the grantor's control,[2] or the circumstances surrounding its possession negative an intention to make a legal delivery,[3] none other than strong and most satisfactory evidence of non-delivery should be allowed to prevail against the presumption of delivery,[4] otherwise titles could be easily

17. Wedel v. Herman, 59 Cal. 507; Central Trust Co. of California v. Stoddard, 4 Cal. App. 647, 88 Pac. 806. See infra, § 83.

18. Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.

19. Phillips v. Menotti, 167 Cal. 328, 139 Pac. 796; Lewis v. Burns, 122 Cal. 358, 55 Pac. 132; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; Branson v. Caruthers, 49 Cal. 374.

20. McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778.

1. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Corker v. Corker, 95 Cal. 308, 30 Pac. 541; Ord v. Ord, 99 Cal. 523, 34 Pac. 83; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; Branson v. Caruthers, 49 Cal. 374; Leo G. McLaughlin Co. v. Phillips, 31 Cal. App. Dec. 818, 189 Pac. 788; Cappler v. Cowan, 39 Cal. App. 630, 179 Pac. 526; Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806.

2. See supra, §§ 58, 71.

3. See supra, §§ 54, 60.

4. Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193 (doctrine approved in Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806, the court in the latter case, however, stating as the general rule that while between the parties the question of delivery is to be determined by a preponderance of

defeated, and no one could be regarded as being secure in the ownership of land.[5] And there is greater reason for the rule where the rights of third persons have intervened.[6] On the other hand, the finding of a deed in the possession of the grantor supports a presumption that it never was delivered;[7] although the presumption is overcome by indubitable evidence that custody and control of the deed were taken by him after delivery thereof merely for safekeeping, and not for the purpose of suspending its effect.[8] It has been held that the presumption of delivery cannot be indulged in opposition to the presumption of innocence where a material element of a serious criminal charge, such as selling land twice within the purview of section 533 of the Penal Code, is involved.[9]

§ 75. Benefit as Showing Acceptance.—Although the law does not force a man to take title against his will,[10] there is a presumption of acceptance by the grantee of a deed beneficial to, and imposing no burdens upon him, where it was delivered to a third person for his benefit.[11] And the presumption is stronger where the grantee is an infant than where he is an adult.[12] But if the deed expresses a money consideration, it is not presumed benefi-

evidence, in cases where the rights of third persons have intervened the proof of nondelivery should be clear and convincing); Branson v. Caruthers, 49 Cal. 374; Towne v. Towne, 6 Cal. App. 697, 92 Pac. 1050.

5. Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.

6. Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806.

7. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; City Lumber Co. v. Brown, 31 Cal. App. Dec. 844, 189 Pac. 830.

8. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940. See, also, § 62, supra.

9. People v. Scott, 22 Cal. App. 54, 133 Pac. 496. As to the presumption of innocence generally, see CRIMINAL LAW.

10. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

11. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; De Levillain v. Evans, 39 Cal. 120; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736.

12. De Levillain v. Evans, 39 Cal. 120.

cial in the absence of proof of payment; for the reason that in such case the grantee becomes liable to a civil action, and attachment and execution process, on account of the purchase money. A similar situation arises when the deed is made as a payment of indebtedness of the grantor, where it does not appear but that the consideration for the deed exceeds the amount of the indebtedness.[13] The presumption of acceptance, however, arising from the beneficial nature of the transfer, will not be indulged to the prejudice of third persons, acquiring rights in good faith, intermediate the execution of the deed and its acceptance in fact.[14]

§ 76. Dealings With Property as Evidence of Delivery. The cases in which the acts of the parties in dealing with the property described in a deed have been treated as having an important bearing upon the question of delivery have usually been those where such acts were inconsistent with the theory of an effective delivery. Thus, a finding that certain deeds were delivered was held not to have been overcome by the fact that the grantor subsequently executed a deed of the same property to another person, it being said that such subsequent act might indicate either that the grantor had not intended to deliver the first deeds, or place them beyond his power of recall, or that he had forgotten the previous transaction, and merely raised a conflict in the evidence.[15] Similarly, where a wife, following the execution of a deed by her to the husband, joined with him in executing a deed of trust to the property which provided for reconveyance to the wife, such fact did not destroy the effect of a finding

13. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

14. Green v. Skinner, 185 Cal. 435, 197 Pac. 60 (inferentially decided following Hibberd v. Smith, infra, though the presumption of acceptance arising from the apparent beneficial nature of the deed was not expressly referred to); Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46. Compare infra, § 87.

15. Smith v. Smith, 173 Cal. 725, 161 Pac. 495.

of the absolute delivery of the first deed, it appearing that the deed was not of record and that the parties did not desire to have it appear of record.[16] And a grantee's claim of delivery was not concluded by the fact that in his petition for letters testamentary on the grantor's estate the property was described as being "subject to a partially executed conveyance";[17] or that he made no claim to the property when the will was read, the deed being lost and the grantee supposing it would be useless in such case to set up his claim under the deed.[18]

The retaining possession of the property and the exercise of acts of proprietorship over it by the grantor usually lead to the conclusion of nondelivery.[19] And an inference of nondelivery may be strengthened by acts of the grantee, as, for example, where he included the property in his inventory of the deceased grantor's estate.[20] But the retention of the property by the grantor and acts of similar import may be shown not to be inconsistent with an intention to make a complete and operative delivery, as where the deed was in the nature of a voluntary settlement, and the grantee continued to live on the land with the grantor as theretofore.[1]

§ 77. Recitals in Deed—Indorsements.—Recitals and instructions as to its disposition contained in the deed itself are evidence of the grantor's intention and may be relied upon to show absolute delivery.[2] Though an acknowledg-

16. Tyler v. Currier, 147 Cal. 31, 81 Pac. 319.

17. Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544.

18. Reed v. Smith, 125 Cal. 491, 58 Pac. 139.

19. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Huntley v. San Francisco Savings Union, 130 Cal. 46, 62 Pac. 255; Cappler v. Cowan, 39 Cal. App. 630, 179 Pac. 526.

20. Meeker v. Spencer, 41 Cal. App. 400, 182 Pac. 782.

1. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Reed v. Smith, 125 Cal. 491, 58 Pac. 139.

2. Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; Schuur v. Rodenback,

ment of receipt indorsed upon the deed and signed by the grantee has been held under special circumstances to have no significance favorable to its delivery, but rather to the contrary.[3] Such recitals are not conclusive evidence of the grantor's intention, such as to preclude parol evidence of his intention.[4] And the admission of such evidence is not inconsistent with the rule that extrinsic evidence is not admissible to vary or contradict the terms of a written instrument.[5] The grantor has the right at any time up to the date of actual delivery to modify, enlarge or even annul his intentions in this respect, and accordingly it may be shown by parol that his intentions as to the delivery were different from those expressed in the deed.[6] Thus, a recital in a deed that it was to be left in the care of a third person named therein until the death of the grantor, and was then to be delivered to the grantee, is not contradicted by evidence of the agreement going to the consideration of the deed and making its final delivery further conditional, and such evidence is admissible.[7] The words "has executed unto" when used in a deed import both a making and a delivery.[8]

§ 78. Acts and Declarations as Evidence of Delivery.— As indicated in the preceding section, delivery of an instrument as a question of fact is independent of the writing itself, and upon that question, from the very nature

133 Cal. 85, 65 Pac. 298; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Kenney v. Parks, 6 Cal. Unrep. 111, 54 Pac. 251.

3. Stone v. Daily, 181 Cal. 571, 185 Pac. 665 (inferentially).

4. Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Stone v. Daily, 181 Cal. 571, 185 Pac. 665 (a case where the grantor's acknowledgment of receipt was indorsed upon the deed).

5. See Ruiz v. Dow, and Howlin v. Castro, infra; and see, generally, EVIDENCE.

6. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867.

7. Howlin v. Castro, 136 Cal. 605, 69 Pac. 432 (holding it was not essential that the depositary be informed of the agreement to make it effective).

8. Bagley v. McMickle, 9 Cal. 430. See Code Civ. Proc., § 1933, and see infra, § 231, as to pleading "execution" of deed.

of the case, parol evidence is admissible.[9] While some uncertainty was created by certain of the decisions as to the admissibility in evidence of the grantor's declarations relating to his intention in the delivery of a deed,[10] it is now settled in California that when the very question in issue is whether the grantor has parted with title and has delivered his deed to this end, evidence of his acts, including his declarations, made before,[11] after[12] or at the time when it is contended he parted with title,[13] is not only properly admissible but is important as bearing upon the question of delivery.[14] Since where a grantor dies the opposing testimony to the transaction cannot be contradicted by him, it is clear that to refuse admission of his declarations in evidence would merely serve as an invitation to fraud and perjury and an insurance of their success.[15] Similarly, evidence of the acts and declarations

9. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664. See supra, §§ 74, 77.

10. Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338 (explained and distinguished in Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1, and Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800); Dean v. Parker, 88 Cal. 283, 26 Pac. 91 (referred to in concurring opinion of De Haven, J., in Ord v. Ord, 99 Cal. 523, 34 Pac. 83, as stating the rule too broadly, it not being limited to declarations sustaining the deed).

11. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806.

12. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Reed v. Smith, 125 Cal. 491, 58 Pac. 139; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Ord v. Ord, 99 Cal. 523, 34 Pac. 83; Dean v. Parker, 88 Cal. 283, 26 Pac. 91; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806; Hibberd v. Smith, 1 Cal. Unrep. 554.

13. Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Union Oil Co. v. Stewart, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; Dean v. Parker, 88 Cal. 283, 26 Pac. 91.

14. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1.

15. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1.

of the grantee while the deed is in his actual possession are admissible upon the question of his acceptance of it.[16] But declarations of the grantor are generally only admissible to sustain his deed, not to disparage it.[17] Where such declarations are in the form of written instructions to the depositary, and they are entirely in writing, their construction is a pure question of law;[18] but if they do not purport to be all of the directions given they may be supplemented by evidence of the surrounding circumstances.[19]

§ 79. **Denial and Qualification of Delivery.**—The acts or declarations of a grantor, made after he has parted with his title and in disparagement of it, and hence in his own interest, are inadmissible unless made in the presence of the grantee.[20] This rule is elementary[1] and unimpeachable.[2] A grantor cannot be allowed to undermine his deed either by words or acts. Thus, a grantor's order upon the depositary to redeliver the deed to him cannot be received as evidence of the intent or power of the grantor to revoke or recall the deed.[3] And declarations of the grantor expressive of his intention and wishes,[4] or expressive of his belief as to what he had done or accomplished,[5] are not controlling as to what in fact he had

16. Kidder v. Stevens, 60 Cal. 414.

17. See infra, § 79.

18. Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578.

19. Smith v. Smith, 173 Cal. 725, 161 Pac. 495. See generally EVIDENCE.

20. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940; Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Ord v. Ord, 99 Cal. 523, 34 Pac. 83 (limiting the rule laid down in Dean v. Parker, 88 Cal. 283, 26 Pac. 91); Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

1. Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

2. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1.

3. Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

4. Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578.

5. Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216.

or had not done or accomplished. On the other hand, the declaration of a grantee made to a third person which tends to qualify the delivery of a deed is admissible as a declaration against interest if it militates in any way against the validity of the title of the grantee.[6] It seems that declarations of the depositary made while holding the deed as such depositary are inadmissible to impeach the delivery.[7] And testimony of the depositary as to whether he would have delivered the deed back to the grantor if the latter had called for it is inadmissible upon the question of the intention of the grantor as to delivery.[8]

§ 80. Execution and Acknowledgment as Showing Delivery.—The code provides that "A grant duly executed is presumed to have been delivered at its date."[9] Although it has been inferred that this provision only applies to the time and not to the fact of delivery,[10] the rule is not so narrow as this inference would make it appear, the authorities generally supporting the view that the presumption under the code extends to proof of delivery.[11] And so, while it has been held that no legal pre-

6. Bias v. Reed, 169 Cal. 33, 145 Pac. 516.

7. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 708, 151 Pac. 1 (conceded without deciding, but holding their admission was without prejudice under the state of the evidence). See generally EVIDENCE.

8. Corker v. Corker, 95 Cal. 308, 30 Pac. 541; Dean v. Parker, 88 Cal. 283, 26 Pac. 91.

9. Civ. Code, § 1055. Date of acknowledgment as evidence of the time of delivery, see infra, § 85.

10. Boyd v. Slayback, 63 Cal. 493. See Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193, stating that such may be the inference from Boyd v. Slayback, supra, but not upholding such a construction of the code rule.

11. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Lewis v. Burns, 122 Cal. 358, 55 Pac. 132 (holding that the recording of a deed after the death of the grantor does not render it insufficient evidence of its delivery at its date); Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; McFadden v. Mitchell, 61 Cal. 148; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806. See, also, cases cited in ACKNOWLEDGMENTS, vol. 1, p. 232, notes 17–19.

sumption of the delivery of a deed arises from its signing and acknowledgment and that the party claiming under it must prove its delivery,[12] the rule is rather to the contrary effect, and hence it has been held that in the absence of other evidence bearing on the question of delivery, it is erroneous for a trial court in the face of the acknowledgment to find that no delivery took place.[13] Aside from the presumption arising from the fact of the due execution of a deed, there may, of course, be evidentiary facts upon which the court may rely to support the fact of delivery.[14] And an acknowledgment of a deed followed by the transfer of its possession to the grantee, without explanatory or qualifying words or acts to indicate any other intent, is, by force of section 1948 of the Code of Civil Procedure, prima facie evidence of complete execution, that is, of delivery with intent to make it operative as a transfer of title.[15] It seems that the fact that a deed was not acknowledged and recorded until long after its date may raise the presumption that it was not delivered at its date.[16]

§ 81. Necessity of Record—Intention to Deliver.—Inasmuch as intention to deliver is a necessary requisite to

12. Boyd v. Slayback, 63 Cal. 493.

13. Thomas v. Fursman, 177 Cal. 550, 171 Pac. 301; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778.

14. Murray v. Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Gernon v. Sisson, 21 Cal. App. 123, 131 Pac. 85; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806. See McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778, where, in applying the above code provision to a deed in evidence, it was said: "If admissible without further proof, it must be competent evidence of a grant to the grantee from the grantor, and conclusive unless impeached." And see this case for the proposition that possession of the deed by the grantee is prima facie evidence of delivery; and citations thereof in Towne v. Towne, 6 Cal. App. 697, and Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868. See supra, § 73.

15. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518 (applied to an assignment of mortgage); followed in Shannon v. Aagaard, 45 Cal. App. 733, 188 Pac. 317. Compare supra, § 73.

16. Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593.

a legal and operative delivery of a deed,[17] the mere placing the deed on record cannot, in the absence of an intention to execute it, make the deed effective as such.[18] Hence, the recording of the deed by the purported grantee is not a delivery unless it comes from the hands of the grantor, or someone claiming through or under the grantor.[19] Nor is the recording of a deed necessary to its delivery.[20] Consequently, the fact that a deed was not recorded until after the death of the grantor does not defeat a delivery otherwise established.[1] Though the fact that a deed was not intended to be recorded until after the death of the grantor is evidence going to the question of intent as affecting delivery.[2]

§ 82. Knowledge and Assent of Grantee.—Acceptance of a deed by the grantee being essential to a complete delivery,[3] the recording of a deed without the knowledge or consent of the grantee or his subsequent approval, and in the absence of any circumstances such as raise a presumption of acceptance, cannot operate as a delivery.[4] Thus, acceptance by a grantee is not shown by the mere fact that he requested his vendors to make a deed and place it of record, where the instrument which was recorded was without the grantee's knowledge and did not convey the title bargained for.[5] While the assent of a

17. See supra, § 52.

18. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Cappler v. Cowan, 39 Cal. App. 630, 179 Pac. 526; Rising v. Gibbs, 3 Cal. Unrep. 506, 30 Pac. 589.

19. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561.

20. Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Leo G. McLaughlin Co. v. Phillips, 31 Cal. App. Dec. 818, 189 Pac. 788.

1. Lewis v. Burns, 122 Cal. 358, 55 Pac. 132; Corker v. Corker, 95 Cal. 308, 30 Pac. 541.

2. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Ostrom v. De Yoe, 4 Cal. App. 326, 87 Pac. 811.

3. See supra, § 49.

4. Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Goldstein v. Hensley, 4 Cal. App. 444, 88 Pac. 507.

5. Goldstein v. Hensley, 4 Cal. App. 444, 88 Pac. 607.

grantee to the conveyance is a question of fact, the mere fact that he was absent from the state at the time of execution and recordation, and that the deed was made at the instance of the grantor, is not conclusive evidence of the grantee's nonassent and hence of nondelivery.[6]

§ 83. Record as Evidence.—The due recordation of a deed is prima facie evidence of its delivery,[7] and after the lapse of many years is strong evidence. If the law were otherwise it would be impossible to deraign title from a source at all remote.[8] But the recording of a deed is not evidence of its delivery unless it came from the hands of the grantee therein named, or from someone claiming under or through him. Thus, where the nominal grantee shown in the deed was erroneous, in the absence of a showing, actual or presumptive, that there was such a person, by the production of the deed by one claiming through him, it was held that no delivery was proved.[9] A delivery may be predicated upon recordation as evidence of intent, as where the grantor, who was also one of the nominal grantees of a trust deed, recorded it and afterward treated it as an operative conveyance;[10] or as being thereby placed beyond the grantor's control, as where the grantor permitted the deed to be recorded,

6. Bensley v. Atwill, 12 Cal. 231.

7. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279; Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7; Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734 (conceded for purpose of decision); Wedel v. Herman, 59 Cal. 507; Downer v. Smith, 24 Cal. 114 (applying the rule to an alcalde's record; but holding that delivery was not required in case of an alcalde's grant. See supra, § 48); Bensley v. Atwill, 12 Cal. 231.

8. Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7.

9. Barr v. Schroeder, 32 Cal. 609 (Sawyer, J., dissenting on ground that in the absence of evidence that there was no such grantee, the record was presumptive evidence that the deed was delivered for his benefit). See Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; and Hibberd v. Smith, 1 Cal. Unrep. 554, affirming the rule stated in Barr v. Schroeder, supra.

10. Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790.

and the recorder subsequently mailed it to the grantee.[11] The time of recording may constitute the basis of a presumption as to the time of delivery; as where two deeds of the same property by the same grantor bore the same date, it was presumed that the deed first recorded was first delivered.[12] But the presumption arising from the recordation is rebuttable.[13]

VI. Operation and Effect.

Time.

§ 84. General Rule—Effect of Contingent Delivery.—A deed, following the general rule of contracts,[14] takes effect from its delivery,[15] and irrespective of its date,[16] the act of delivery operating ipso facto to transfer the title to the land described in the deed.[17] This is the converse of the rule that a deed does not take effect until delivery.[18] Thus, a deed executed to a corporation before

11. Rossiter v. Schultz, 43 Cal. App. 716, 185 Pac. 997.

12. Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

13. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734; Bensley v. Atwill, 12 Cal. 231.

14. Civ. Code, § 1626; and see CONTRACTS, vol. 6, p. 236.

15. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 104 Am. St. Rep. 84, 1 L. R. A. (N. S.) 315, 79 Pac. 447; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Martin v. Splivalo, 69 Cal. 611, 11 Pac. 484; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Ingoldsby v. Juan, 12 Cal. 564; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661; Ragan v. Ragan, 29 Cal. App. 63, 154 Pac. 479; Gernon v. Sisson, 21 Cal. App. 123, 131 Pac. 85; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348.

16. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

17. Stone v. Daily, 181 Cal. 571, 185 Pac. 665; Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860.

18. Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106;

its articles were filed, could take effect only upon its delivery after the corporation had become a legal entity.[19] The title either vests presently when the deed is delivered or it does not vest at all.[20] The general rule is true though the possession or enjoyment of the estate conveyed is deferred.[1] Accordingly, it is provided in the code that "The delivery of the grant, when a limitation, condition, or future interest is created by grant . . . is to be deemed the time of the creation of the limitation, condition or interest within the meaning of . . . the code."[2]

Effect of contingent delivery.—A deed delivered subject to a condition to be performed by the grantee, as in the case of an escrow, does not pass title until the performance of the condition,[3] except where the condition is certain to occur regardless of the acts of the parties, such, for instance, as the death of the grantor.[4] Hence, when the escrow has been abandoned, or rescinded,[5] the deed is ineffectual for any purpose, and its subsequent delivery to the grantee passes title as of the date of such delivery. It does not relate back to the time of the delivery in escrow.[6] The distinctions between a deed and escrow,[7] and a deed and a will,[8] are discussed in other paragraphs.

Boyd v. Slayback, 63 Cal. 493; Dyson v. Bradshaw, 23 Cal. 528. Compare, supra, § 48.

19. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

20. Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

1. McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 104 Am. St. Rep. 84, 1 L. R. A. (N. S.) 315, 79 Pac. 447. Compare, supra, § 70.

2. Civ. Code, § 749.

3. Civ. Code, § 1057. See supra, § 69; and see ESCROW.

4. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338. See infra, §§ 69, 70. For effect of conditional delivery to the grantee, see supra, §§ 60, 61.

5. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Howlin v. Castro, 136 Cal. 605, 69 Pac. 432.

6. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931. See, generally, ESCROW.

7. See supra, § 69.

8. See supra, §§ 9, 10.

§ 85. **Date as Evidence.**—By express provision of the code "A grant duly executed is presumed to have been delivered at its date."[9] Thus, evidence that a certain deed was delivered supports a finding that it was delivered on the date it bears.[10] And where a complaint to secure specific performance of a contract of sale referred to a deed of the defendant which was dated prior to the contract, it was presumed that the title passed from the defendant at the date of the deed and that the question of the good faith of his grantee was not involved.[11] While there is an intimation in an early decision that this presumption applies only to the time and not to the fact of delivery, this intimation does not express the rule, for aside from the difficulty of presuming the time of delivery without presuming the fact of delivery, it is clear that the plain language of the statute does not admit of any such forced construction.[12] The recital of the date is not, however, conclusive evidence of the time of delivery,[13] for section 1055 of the Civil Code creates a disputable presumption, not being made conclusive by express provision of the statute.[14] Hence, the presumption arising from the fact

9. Civ. Code, § 1055; Marple v. Jackson, 184 Cal. 411, 193 Pac. 940; Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279; Lewis v. Burns, 122 Cal. 358, 55 Pac. 132; Murray v. Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; Fratt v. Toomes, 48 Cal. 28; Treadwell v. Reynolds, 47 Cal. 171; Lick v. Diaz, 30 Cal. 65; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512; Gernon v. Sisson, 21 Cal. App. 123, 131 Pac. 85; Daneri v. Gazzola, 2 Cal. App. 351, 83 Pac. 455; Gerke v. Cameron, 5 Cal. Unrep. 798, 50 Pac. 434; Merle v. Meagher, 1 Cal. Unrep. 644.

10. Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837; McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279.

11. Eaton v. Wilkins, 163 Cal. 742, 127 Pac. 71.

12. See supra, § 80.

13. Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301; Rhine v. Ellen, 36 Cal. 362; Merle v. Meagher, 1 Cal. Unrep. 644. Acknowledgment and record as evidence, see supra, §§ 80, 83.

14. See Code Civ. Proc., § 1962,

of execution may be controverted by evidence aliunde the deed,[15] either direct or indirect.[16] The question of delivery being one of fact and depending upon the intention,[17] the burden of proof is upon the one claiming the delivery was other than shown by the date of the deed.[18] Of course such presumption is overcome by evidence showing that the deed was never in fact delivered, or by showing its actual delivery at a time other than at its date.[19]

§ 86. Deeds of Same Date—Single Transaction.—Two deeds may be executed on the same day and so connected with each other that they may be regarded as a single transaction. In such case, in conformity with the general rule of construction,[20] they may be construed together, and may properly be given effect in such order as shall carry out the intention of the grantor and secure the rights of the respective parties. If two deeds to different grantees are dated and acknowledged on the same day, but one is recorded before the other, it is to be presumed that the one first recorded was first delivered; at least the burden of proof is on the one claiming under the other deed to prove its prior delivery, and in the absence of such proof, it is to be presumed in support of the judgment that the deed first recorded was first delivered.[1]

for an enumeration of the presumptions deemed conclusive.

15. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940; Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301; Treadwell v. Reynolds, 47 Cal. 171; Gerke v. Cameron, 5 Cal. Unrep. 798, 50 Pac. 434; Merle v. Meagher, 1 Cal. Unrep. 644; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Daneri v. Gazzola, 2 Cal. App. 351, 83 Pac. 455 (applying Code Civ. Proc., § 1961).

16. See supra, §§ 51, 52.

17. Huntley v. San Francisco Savings Union, 130 Cal. 46, 62 Pac. 255.

18. Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551.

19. Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; Daneri v. Gazzola, 2 Cal. App. 351, 83 Pac. 455.

20. See infra, § 129.

1. Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542 (but holding that this presumption does not apply as re-

§ 87. Relation Back of Acceptance.—It is a general rule that the delivery of a deed to a third person for the benefit of the grantee takes effect by relation from the time of the act,[2] even though the grantee had no knowledge of the deed and there was no acceptance by him until after the grantor's death.[3] In the latter case, the doctrine that an agent's authority terminates with the death of his principal[4] has no application, for the reason that the rule declared does not depend upon the continuing authority of the depositary to deliver the deed.[5] But the doctrine of relation, it is said, is a fiction of law in which there is always equity, never working an injury, and which is never permitted or applied so as to do wrong to third persons, although as between parties to the deed, it may be adopted for the advancement of justice.[6] Accordingly, a grantee's assent will not be permitted to operate retroactively and by relation give effect to a deed as of the date when the grantor parted with it, when such operation would destroy an intervening conveyance or a judgment lien acquired in good faith;[7] or defeat the rights of a surviving joint tenant, which accrued on the death of the grantor, and prior to the grantee's knowledge or acceptance of the deed.[8]

spects certain additional property included in the last recorded deed which was held to have taken effect as to that property on its date).

2. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; Nelson v. Colton, 36 Cal. App. 69, 171 Pac. 701; Hibberd v. Smith, 1 Cal. Unrep. 554.

3. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736.

4. See AGENCY, vol. 1, p. 703 et seq.

5. Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736.

6. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

7. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Hibberd v. Smith, 1 Cal. Unrep. 554.

8. Green v. Skinner, 185 Cal. 435, 197 Pac. 60 (as between the surviving joint tenant and the judgment creditor the former has the stronger right, because his right exists wholly independent of the grantor, while the latter claimant is considered as standing in the shoes of the debtor).

On Title and General Contractual Relations.

§ 88. **In General.**—The primary purpose and effect of a deed is to transfer title, or the incidents flowing from title, or some right, as possession, where the right depends upon title.[9] A grantee of a deed absolute on its face cannot, ordinarily, invalidate his own title, except on the ground of fraud, accident or mistake.[10] It follows, except where a deed is wholly void as distinguished from being merely voidable,[11] that a second deed of the same property by the same grantor, is, as a rule, wholly inoperative,[12] and passes no title legal or equitable,[13] even though the later deed is antedated,[14] and whether such second instrument be deemed a deed or a mortgage.[15] Even if the first deed is voidable for fraud and mistake, the second deed is ineffective where the grantor has taken no steps to avoid the former deed;[16] but a second deed has the effect of depriving the grantor of any right of action to have the first deed set aside.[17] On the other

9. Rianda v. Watsonville Water etc. Co., 152 Cal. 523, 93 Pac. 79; Daubenbiss v. White, 3 Cal. Unrep. 590, 31 Pac. 360.

10. Lee v. Evans, 1 Lab. 173. See infra, § 99.

11. See infra, § 99.

12. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931; Treat v. Treat, 170 Cal. 329, 150 Pac. 53, 57; Tully v. Tully, 137 Cal. 60, 69 Pac. 700; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7; Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Farmer v. Ukiah Water Co., 56 Cal. 11; Talbert v. Hopper, 42 Cal. 397; Alemany v. Daly, 36 Cal. 90; Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670; Tustin v. Faught, 23 Cal. 237; Rosenthal v. Silveira, 42 Cal. App. 637, 184 Pac. 58; Trimble v. Hellar, 23 Cal. App. 436, 138 Pac. 376; House v. Ponce, 13 Cal. App. 279, 109 Pac. 161; Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315; Southern California Ry. Co. v. Southern Pac. R. R. Co., 5 Cal. Unrep. 288, 43 Pac. 1123; Peres v. Sunol, 1 Cal. Unrep. 647.

13. Gallagher v. Pine, 51 Cal. 94.

14. Bowman v. Cudworth, 31 Cal. 148. Compare infra, § 85.

15. McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 666; Klauber v. Vigneron, 3 Cal. Unrep. 795, 32 Pac. 248.

16. Peres v. Sunol, 1 Cal. Unrep. 647.

17. Rianda v. Watsonville Water etc. Co., 152 Cal. 523, 93 Pac. 79.

hand, where the first deed is void,[18] or it is to be deemed a mortgage,[19] or where the title derived from the first conveyance has been extinguished by adverse possession,[20] a second deed is an operative conveyance. It may be said in this connection that the essential element of the crime of selling land twice, is an effective first sale.[1] If the second grantee is a third person, he has no protection against the first deed, except as he is without actual or constructive notice of the first conveyance, and occupies the position of a bona fide purchaser for value.[2] Whether in any case a second deed by the grantor is admissible in evidence on the question of title depends upon the general rules of evidence.[3] While not its primary purpose, a deed may contain covenants[4] and conditions,[5] and where there is no title in the grantor which can pass the grantor may still be bound by an implied covenant therein,[6] and the deed itself may in some cases be enforced in equity as a covenant to convey,[7] or by way of estoppel.[8]

§ 89. **Deed Poll as Binding Grantee.**—It is a generally accepted rule in all jurisdictions that a grantee without signing the deed is bound as a covenantor by his acceptance, where the deed contains executory covenants to be performed on his part, such conflict as may exist being only as to the form of the remedy.[9] Thus, a covenant to

18. Lieman v. Golly, 178 Cal. 544, 174 Pac. 33; Wunderlin v. Cadogan, 50 Cal. 613.

19. Wolfe v. Langford, 14 Cal. App. 359, 112 Pac. 203. See MORTGAGES.

20. Hartman v. Reed, 50 Cal. 485.

1. People v. Scott, 22 Cal. App. 54, 133 Pac. 496; Pen. Code, § 533.

2. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Colton v. Seavey, 22 Cal. 496; Snodgrass v. Ricketts, 13 Cal. 359; Sears v. Douthitt, 18 Cal. App. 774, 124 Pac. 453. See, generally, VENDOR AND PURCHASER.

3. Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7; Peck v. Vandenberg, 30 Cal. 11.

4. See COVENANTS.

5. See infra, § 195 et seq.

6. Holzheier v. Hayes, 133 Cal. 456, 65 Pac. 968.

7. Estate of Ryder, 141 Cal. 366, 74 Pac. 993.

8. See infra, § 97; Estate of Ryder, 141 Cal. 366, 74 Pac. 993.

9. 8 R. C. L. 1020.

reconvey contained in a deed creates an express trust which the grantee assumes by his acceptance of the deed.[10] In a simliar manner the grantee may assume and agree to pay a mortgage encumbrance on the property conveyed.[11] The covenant in such cases is sufficiently proved by the existence of a covenant to that effect in the deed of the grantee, the latter being presumed to have had knowledge of its existence from the time he accepted the instrument.[12] A formal promise is not necessary if the intention of the grantee to obligate himself appears from the entire instrument.[13] The binding effect on the grantee of conditions and restrictions contained in deeds is treated in subsequent paragraphs.[14]

§ 90. **Quitclaim Deed.**—A "quitclaim deed" and a "release deed" are closely related. Such deeds at common law were not conveyances in a technical sense unless the party taking was in possession of the land. But the element of possession came to be a mere fiction, and effect was given to such deeds by placing the intended grantee constructively in possession by virtue of a lease, or bargain and sale for a year, operating under the Statute of Uses; a subsequent release or quitclaim then operated to enlarge the estate.[15] But in California from the earliest times the quitclaim deed has been in every-day use for the purpose of transferring title to land,[16] and has been con-

10. Hearst v. Pujol, 44 Cal. 230. See TRUSTS.

11. Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868. See MORTGAGES.

12. Dutton v. Locke-Paddon, 37 Cal. App. 693, 174 Pac. 674.

13. Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868. See infra, § 52, as to rule of intention.

14. See infra, § 195 et seq.

15. 8 R. C. L. 1024.

16. Bond v. Aickley, 168 Cal. 161, 141 Pac. 1188; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; Taylor v. Opperman, 79 Cal. 468, 21 Pac. 869; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; Packard v. Moss, 68 Cal. 123, 8 Pac. 818 (holding that such deed constitutes color of title. See ADVERSE POSSESSION, vol. 1, p. 474); Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867 (the court repudiat-

sidered as effectual for that purpose as deeds of bargain and sale,[17] or any other form of deed.[18] The general modern rule is to regard a mere release equally with a quitclaim deed as a substantive mode of conveyance.[19] And while in an early California case it was held that a release of all the grantor's title and interest in certain land, where the releasee had neither possession nor any interest in the land, was void,[20] it has also been held that the words "release" "all claims" as against a certain lot were sufficient in view of the circumstances to convey the title to the lot.[1] A quitclaim deed may contain words of grant,[2] and it is also included in the term "grant" when the latter is used in its generic and not in its technical sense.[3] A quitclaim deed, however, purports and operates to transfer only such interest as the one executing it then has, and hence does not carry an after-acquired title.[4] The fact

ing the contention of counsel that a quitclaim deed did not operate as a conveyance prior to 1855, citing cases); Frey v. Clifford, 44 Cal. 335; Graff v. Middleton, 43 Cal. 341; Lawrence v. Ballou, 37 Cal. 518; Green v. Clark, 31 Cal. 591; Morrison v. Wilson, 30 Cal. 344 (rule applied to covenant of nonclaim); Carpentier v. Williamson, 25 Cal. 154; Downer v. Smith, 24 Cal. 114; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Sullivan v. Davis, 4 Cal. 291; Rosenthal v. Silveira, 42 Cal. App. 637, 184 Pac. 58; House v. Ponce, 13 Cal. App. 279, 109 Pac. 161; Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686; Packard v. Johnson, 2 Cal. Unrep. 365, 4 Pac. 632; Wilson v. Truebody, 1 Cal. Unrep. 238; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

17. Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867; Graff v. Middleton, 43 Cal. 341; Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686; Packard v. Johnson, 2 Cal. Unrep. 365, 4 Pac. 632.

18. Taylor v. Opperman, 79 Cal. 468, 21 Pac. 869; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

19. 8 R. C. L. 1025.

20. Branham v. City of San Jose, 24 Cal. 585.

1. Willson v. Truebody, 1 Cal. Unrep. 238.

2. Muller v. Boggs, 25 Cal. 175; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108.

3. Faivre v. Daley, 93 Cal. 664, 29 Pac. 256 (applied in construction of § 1243, Code Civ. Proc.); McFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248 (applied to code provisions on interpretation of grants. Civ. Code, § 1066 et seq.).

4. See infra, § 146.

It is a general rule that a conveyance of the "right, title and interest" of the grantor vests in the purchaser only what the grantor could claim, and subject to all de-

that a quitclaim deed may in certain cases be given greater effect and may be made to prevail over a prior unrecorded deed by virtue of the recording act forms an exception to the rule.[5]

Usual operative words.—The usual operative words of a simple quitclaim deed are "remise, release and quitclaim";[6] but it has been said that the words "remise, release and forever quitclaim my right, title and interest, both in law and equity" are the most apt to convey both the legal and equitable interests of the grantor,[7] and that the words "all claim and demand whatsoever, as well in law as in equity" are of more significance than the words of a quitclaim deed in the usual form.[8]

§ 91. Record — Change of Possession. — The law has provided for the authentication and registration of deeds of conveyance and mortgages whereby constructive notice of the contents thereof shall be given to subsequent purchasers and mortgagees, the object being to impart notice by the record that the owner of the property has conveyed or encumbered it.[9] But an unrecorded deed is a valid conveyance of the title as between the immediate parties thereto,[10] and as to all

fects and equities which could have been asserted against the grantor: Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309. See infra, § 138. Such a deed without covenants of title is a mere quitclaim deed. O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; Gee v. Moore, 14 Cal. 472 (holding that a covenant of warranty is confined to the estate conveyed. See COVENANTS, vol. 7, p. 758). And a quitclaim deed carries what is incident or appurtenant to the estate granted; Williams v. Harter, 121 Cal. 47, 53 Pac. 405. Compare infra, § 151.

5. Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309. See infra, § 91.

6. Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108.

7. McFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

8. Stanway v. Rubio, 51 Cal. 41; McFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

9. See RECORDS.

10. See Civ. Code, § 1217; Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837; Wolf v. Gall, 176 Cal. 787, 169 Pac. 1017; Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Eshleman

the world,[11] save a subsequent purchaser or encumbrancer in good faith and for a valuable consideration whose instrument is first duly recorded,[12] as to the latter of whom it is void.[13] And under the recording system no change of possession of the land is required, as at common law,[14] to complete the transfer of title.[15] A deed passes title at the time of its delivery,[16] though the grantor remained in possession after its delivery,[17] and during his lifetime, and the deed was not recorded until after his death.[18] By so remaining in possession the grantor violates no law and infringes no public policy.[19] The general subjects involving authentication and registration, notice, and the rights of bona fide purchasers are treated in other articles of this work.[20]

§ 92. Curative Statutes.—The existence of defective titles due to loose practice in conveyancing, and strict construction of statutes governing conveyances, together with the public interest requiring certainty in land titles, have

v. Henrietta Vineyard Co., 102 Cal. 199, 36 Pac. 579; McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566; Bowman v. Cudworth, 31 Cal. 148; Landers v. Bolton, 26 Cal. 393; Snodgrass v. Ricketts, 13 Cal. 359; Hunter v. Watson, 12 Cal. 363, 76 Am. Dec. 543; Avery v. Avery, 42 Cal. App. 100, 183 Pac. 453; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661; Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153; Wolfe v. Langford, 14 Cal. App. 359, 112 Pac. 203.

11. Hastings v. Vaughn, 5 Cal. 315; House v. Ponce, 13 Cal. App. 279, 109 Pac. 161.

12. Civ. Code, § 1107; and see cases cited supra.

13. Warnock v. Harlow, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; Plant v. Smythe, 45 Cal. 161; House v. Ponce, 13 Cal. App. 279, 109 Pac. 161; Civ. Code, § 1214.

14. See supra, § 91.

15. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Gernon v. Sisson, 21 Cal. App. 123, 131 Pac. 85; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661.

16. See supra, § 48 et seq.

17. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Tully v. Tully, 137 Cal. 60, 69 Pac. 700; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551.

18. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471.

19. Weeks v. Link, 137 Cal. 502, 70 Pac. 548; Knox v. Kearney, 40 Cal. App. 290, 180 Pac. 661; Fisher v. Ludwig, 6 Cal. App. 144, 91 Pac. 658.

20. See ACKNOWLEDGMENT, vol. 1, p. 218; RECORDS; VENDOR AND PURCHASER.

made curative statutes necessary from time to time by which deeds and other instruments of record are made to impart notice to subsequent purchasers.[1] Such an act, however, has been held not to cure a defect in the execution of a corporation deed where the defect related directly to the authority of the officers to execute the deed.[2] The Civil Code expressly provides that the legality of the execution, acknowledgment, form, etc., of a deed executed prior to the adoption of the code is not affected by any of the provisions of the chapter therein on "Recording Transfers of Real Property."[3] By constitutional provision the legislature is inhibited from passing local or special laws "giving effect to invalid deeds, wills, or other instruments."[4]

§ 93. Confirmation and Correction.—An act of confirmation cannot operate upon or aid a grant or an estate which is void in law.[5] In such case the confirmatory act only confirms the infirmity. And it is said that the only exception to this rule is where the confirmation is the act of sovereign will,[6] as by statute.[7] But a deed that was intended to confirm a prior deed which was void because

1. See Civ. Code, § 1207. See ACKNOWLEDGMENTS, vol. 1, p. 267; RECORDS.

2. McCroskey v. Ladd, 3 Cal. Unrep. 433, 28 Pac. 216.

3. Civ. Code, §§ 1205, 1206 (the chapter mentioned being chapter IV of title IV, part III, and embracing §§ 1158–1218. See infra, § 93, as to confirmation and correction of deeds. See RECORDS.

4. Const., art. IV, § 25, subd. 14. Compare Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18, in which an early deed executed by the city of San Diego was validated by a special act of 1874. For discussion of this subject, generally, see ACKNOWLEDGMENTS, vol. 1, p. 267 et seq.; RECORDS, etc.

5. Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Barr v. Schroeder, 32 Cal. 609; Branham v. City of San Jose, 24 Cal. 585; Phelan v. San Francisco County, 6 Cal. 531; Friedman v. Goodwin, 1 McAll. 142, Fed. Cas. No. 5119; Seabury v. Field, 1 McAll. 1, Fed. Cas. No. 12,574; Griffing v. Gibb, 1 McAll. 212, Fed. Cas. No. 5819. Ratification of agent's act, see Civ. Code, § 2310.

6. Branham v. City of San Jose, 24 Cal. 585.

7. Seabury v. Field; Friedman v. Goodwin; Griffing v. Gibb, cited supra.

of mistakes made therein, has been held to pass title by force of its own provisions, its recitals of a purpose to confirm the prior deed being disregarded.[8] A confirmation makes good a voidable or defeasible title,[9] or removes uncertainty and gives new assurance concerning the title.[10] And while it has been said that confirmation is a contract by which a voidable act is made unavoidable,[11] it has also been said that confirmation can only be matter of evidence.[12] Consequently, the acceptance by the grantee of a deed confirming a prior conveyance of title does not necessarily estop him from relying solely upon the prior conveyance.[13] But if the second deed was made to correct errors contained in the former deed and recites that fact, the recital is binding upon the grantee if he accepts and claims under it.[14] A deed obtained by fraud or undue influence is not ratified by acts which are tainted by

8. Barr v. Schroeder, 32 Cal. 609.

9. Suhr v. Lauterbach, 164 Cal. 591, 130 Pac. 2 (holding, however, that there was no confirmation in this instance); Emeric v. Alvarado, 90 Cal. 44, 27 Pac. 356; Barr v. Schroeder, 32 Cal. 609 (but holding the principle not applicable, the deed being void and not voidable; Branham v. City of San Jose, 24 Cal. 585; Barry v. St. Joseph's Hospital, etc., 5 Cal. Unrep. 625, 48 Pac. 68.

10. Tully v. Tully, 137 Cal. 60, 69 Pac. 700; Boggs v. Merced Mining Co., 14 Cal. 279 (applying the principle to confirmation by statute and court decree).

11. Barr v. Schroeder, 32 Cal. 609.

A grantor may by his subsequent acceptance of a deed from his grantee relating to the land previously conveyed confirm his prior conveyance; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356. But where a grantor subsequently accepted an undertaking by the grantee to mortgage the property conveyed for the grantor's support if found necessary, the undertaking was not deemed such a separate instrument as to constitute a ratification of the deed; Suhr v. Lauterbach, 164 Cal. 591, 130 Pac. 2 (the court points out that there had been no request on the part of the grantor for a performance of the undertaking).

12. Boggs v. Merced Mining Co., 14 Cal. 279.

Thus, where a person while sick and in a condition of great weakness of mind made a deed, but fully recovered and by his subsequent acts showed he was satisfied with the transaction, this amounted to a ratification. Barry v. St. Joseph's Hospital, etc., 5 Cal. Unrep. 625, 48 Pac. 68.

13. Tully v. Tully, 137 Cal. 60, 69 Pac. 700.

14. Sepulveda v. Sepulveda, 77 Cal. 605, 20 Pac. 145.

the original fraud,[15] or which are performed under the same undue influence.[16]

§ 94. Parol Agreements Affecting Title.—It is apparent that a vested title in land cannot be limited or affected except by agreement between the grantor and grantee,[17] and under the statute of frauds such an agreement cannot rest in parol.[18] Hence the fact that both husband and wife, after a conveyance by the husband to the wife, made deeds to each other of the property and deposited them with a third person under circumstances not constituting a delivery of the deeds, could not impair the wife's title to the property.[19] And where after the delivery of a deed in escrow to be finally delivered after the death of the grantor, the grantor by parol agreement gave to the grantee and his heirs the right to occupy and cultivate the land during the grantor's lifetime, such agreement was construed as not destroying or modifying the effect of the completed delivery, but as constituting a present oral transfer of a life estate which was taken out of the statute of frauds by part performance.[20] Where a grantee accepted a conveyance of an undivided interest in a tract of land, which in terms declared that it was in lieu of a previous deed conveying specific portions of the land by metes and bounds, it was held that he was estopped from claiming under the original deed. In equity he is divested of his former title.[1]

§ 95. Redelivery and Cancellation of Grant.—Though the grantor has the right to destroy and nullify an instru-

15. Millar v. Bell, 32 Cal. App. Dec. 894, 192 Pac. 172; Patterson v. Patterson, 32 Cal. App. Dec. 123, 190 Pac. 483.

16. Millar v. Bell, 32 Cal. App. Dec. 894, 192 Pac. 172.

17. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; and see infra, § 95.

18. Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231, and see infra, § 95. See, generally, FRAUDS, STATUTE OF.

19. Bias v. Reed, 169 Cal. 33, 145 Pac. 516.

20. Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231. Compare supra, § 70.

1. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

ment of grant at any time before its actual delivery,[2] when it has once become effective as a deed conveying title its force cannot be impaired by any subsequent act or declaration of the grantor.[3] It is also provided by the code that "Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title";[4] nor is such result accomplished by its destruction by the grantor without the consent of the grantee,[5] or by its destruction by the grantor after the grantee's death.[6] Accordingly, it is held that title cannot be revested in the grantor by the mere redelivery of the deed to him by the grantee,[7] or by the reclaiming possession of the deed.[8] Nor will the surrender of the deed to the grantor with the intent to revest the title in him,[9] or its actual destruction or cancellation pursuant to that intent, accomplish that result.[10] Although where a deed operates merely as an assignment of a contract right, such right may be extinguished by the destruction of the deed with that intent.[11] The title cannot be restored to the grantor otherwise than by reconveyance in writing.[12] Consequently,

2. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867.

3. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; King v. Fragley, 19 Cal. App. 735, 127 Pac. 813.

4. Civ. Code, § 1058.

5. Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231; Cornelius, Estate of, 151 Cal. 550, 91 Pac. 329; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Holmes v. O'Brien, 28 Cal. App. 264, 151 Pac. 1151.

6. Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Tyler v. Currier, 147 Cal. 31, 81 Pac. 319.

7. Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Ahrens v. Adler, 33 Cal. 608 (holding that an offer to return the deed was not an offer to place the grantor in statu quo and hence did not amount to a rescission or offer to rescind); Kearsing v. Kilian, 18 Cal. 491; Roberts v. Abbott, 32 Cal. App. Dec. 1026, 192 Pac. 345.

8. King v. Fragley, 19 Cal. App. 735, 127 Pac. 813.

9. Lawton v. Gordon, 37 Cal. 202 (holding that evidence that deed was withdrawn from recorder's office for that purpose was properly rejected); Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670.

10. Cranmer v. Porter, 41 Cal. 462; Killey v. Wilson, 33 Cal. 690; Bowman v. Cudworth, 31 Cal. 148; Snodgrass v. Ricketts, 13 Cal. 359.

11. Brock v. Pearson, 87 Cal. 581, 25 Pac. 963.

12. Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Cranmer v. Porter, 41 Cal. 462.

the rights of third persons are unaffected by such redelivery,[13] and a deed subsequently executed by the grantee operates to convey the title.[14] And, consistently with the rule, a subsequent deed by the grantor conveys no title or interest, at least in so far as his second grantee is a mere volunteer or donee.[15] An heir may, in the absence of administration, disaffirm a deed obtained from his ancestor in his lifetime by fraud or undue influence.[16]

§ 96. **Recitals as Evidence.**—It is laid down as a general rule that recitals in a deed are not evidence against a stranger, or one holding by paramount title. They operate, technically speaking, as an estoppel, and bind only parties, and those standing as privies in blood, in estate and in law.[17] The presumption is that a grantee who personally accepts, retains and records a deed of conveyance does so with knowledge of its contents.[18] He will not be permitted to plead ignorance of its recitals, after it has been accepted and recorded, as a ground for defeating their force and effect, where such ignorance results from no act of the grantor.[19] The truth of such recitals between the parties or their successors in interest by a subsequent title is conclusively presumed.[20] But this rule

13. Snodgrass v. Ricketts, 13 Cal. 359.

14. Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670.

15. Lawton v. Gordon, 37 Cal. 202; Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670; Killey v. Wilson, 33 Cal. 690; Snodgrass v. Ricketts, 13 Cal. 359.

16. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509.

17. Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18; Moffatt v. Bulson, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022; Sepulveda v. Sepulveda, 77 Cal. 605, 20 Pac. 145; People v. Blake, 60 Cal. 497; Sonoma County Water Co. v. Lynch, 50 Cal. 503; Tompkins v. Crane, 50 Cal. 478; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Donahue v. McNulty, 24 Cal. 411, 85 Am. Dec. 78; Simson v. Eckstein, 22 Cal. 580; Stark v. Barrett, 15 Cal. 361. As to estoppel in general, see infra, § 97.

18. Emery v. Kipp, 154 Cal. 83, 129 Am. St. Rep. 141, 16 Ann. Cas. 792, 19 L. R. A. (N. S.) 983, 97 Pac. 17.

19. Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185. See infra, § 98, as to estoppel of the grantee.

20. Civ. Code, § 1962, subd. 2.

does not extend to recitals or provisions in a deed not necessary to its operation as a conveyance.[1] Their admissibility as evidence depends upon the same principle as the admissibility of a declaration of the person executing the reciting deed. Hence, in general, in order to determine whether a recital is evidence in a given case against a party, it is only necessary to ascertain whether an acknowledgment or confession of the person who executed the deed would be competent.[2] For example, a recital in a deed executed by a wife that the property conveyed was her separate property, acquired in a specified manner, is not evidence of the fact as against the husband, a third party, but is competent as an admission against her grantee.[3] A recital that certain land reserved in a deed had been conveyed to a person named is not admissible as a declaration of the grantor, made while holding the title to the property, within section 1849 of the Code of Civil Procedure.[4] And a recital of a pecuniary consideration in a second deed of the same property is not proof of valuable consideration as against the grantee of the first deed.[5] A recital of a fact which has no effect in law may be disregarded as surplusage, and the deed is valid if it is otherwise sufficient.[6] Recitals of consideration have been specifically considered in another paragraph.[7]

§ 97. Estoppel in General—Of Grantor.—"Every grant of an estate, in real property is conclusive against the

1. Ingersoll v. Truebody, 40 Cal. 603; Rhine v. Ellen, 36 Cal. 362; Peck v. Vandenberg, 30 Cal. 11; Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498.

2. Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172.

3. Lewis v. Burns, 122 Cal. 358, 55 Pac. 132.

4. Tompkins v. Crane, 50 Cal. 478.

5. Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172.

6. Ryan v. Tomlinson, 39 Cal. 639; Barr v. Schroeder, 32 Cal. 609.

7. See supra, §§ 45–47. For recitals of facts showing authority for execution in an official or representative capacity, see CORPORATIONS; EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES; MUNICIPAL CORPORATIONS; TRUST DEEDS, etc.

grantor, also against everyone subsequently claiming under him," except purchasers or encumbrancers who are brought within the protection of the recording laws.[8] A party is estopped by his deed; he is not permitted to contradict it.[9] Accordingly, a grantor is estopped to deny the validity and due execution of his deed,[10] or that he had title at the time of its execution.[11] Likewise, he is estopped from asserting that the deed, if its terms are sufficiently comprehensive, did not convey his entire estate in the land described,[12] including the appurtenances,[13] and from subsequently claiming title therein.[14] Upon this principle a deed to mining claims was held to estop the grantors from denying that they had located the mines in accordance with the laws of the United States, the only way in which the title could be acquired.[15] But where one conveyed an undivided interest in a lot to one person, and then conveyed a portion of the lands as a specific tract to another, he was not estopped by his second conveyance from claiming an original undivided interest in the part not thus specifically conveyed.[16] And where a trust deed executed by husband and wife provided for a reconvey-

8. See Civ. Code, § 1107; and supra, § 91.

9. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356 (holding that a grantor cannot impeach a grant which he had confirmed); Rhine v. Ellen, 36 Cal. 362; Peck v. Vandenberg, 30 Cal. 11; Wolfe v. Langford, 14 Cal. App. 359, 112 Pac. 203; and see cases cited infra, this section.

10. Turner v. Turner, 173 Cal. 782, 161 Pac. 980.

11. Roberts v. Krafts, 141 Cal. 20, 74 Pac. 281; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Belcher etc. Mining Co. v. Deferrari, 62 Cal. 160; Tewksbury v. Provizzo, 12 Cal. 20.

12. Taylor v. Avila, 175 Cal. 203, 165 Pac. 533.

13. Rianda v. Watsonville Water etc. Co., 152 Cal. 523, 93 Pac. 79.

14. Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120; Tewksbury v. Provizzo, 12 Cal. 20.

15. Belcher etc. Mining Co. v. Deferrari, 62 Cal. 160 (the court taking judicial notice of the character of the property and its original ownership in the United States).

16. Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18 (further holding that the second deed did not constitute a parol partition in the absence of acquiescence or consent of the first grantee). See PARTITION.

ance of the property to the wife, it was held, in view of the circumstances, that the husband was not estopped to deny that the wife was owner of the property.[17] So far as a deed is intended to pass or extinguish a right, or to be the exclusive evidence of a contract, it concludes the parties to it; but the principle goes no further. Thus, the deed is not conclusive evidence of the existence of facts acknowledged in the instrument, such as the date of its execution,[18] its consideration, acknowledgment of payment, etc.[19] The principle of estoppel applies also to deeds of partition founded upon mutual releases.[20] But a quitclaim deed does not affirm the possession of any precedent title, interest or easement in the grantor.[1] And where a deed is absolutely void there is no ground for the application of the doctrine of estoppel,[2] either at law or equity, although the instrument is under seal.[3] Estoppel based upon covenants of warranty,[4] and the general subject of estoppel,[5] are treated elsewhere in this work.

§ 98. **Estoppel of Grantee.**—A grantee in fee is not estopped from denying that he received any estate by the conveyance. There can be no estoppel when the occupant is under no obligation express or implied that he will at some time or in some event surrender the possession. In such case he owes no faith or allegiance to the grantor, and he does him no wrong if he treats him as an utter stranger to the title.[6] In one sense the grantee of land

17. Tyler v. Currier, 147 Cal. 31, 81 Pac. 319 (the provision in question being inserted to conform with the record title, which differed from the actual title).

18. See supra, § 85.

19. Rhine v. Ellen, 36 Cal. 362; Peck v. Vandenberg, 30 Cal. 11. See supra, § 45.

20. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Tewksbury v. Provizzo, 12 Cal. 20.

1. Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

2. Vaca Valley etc. R. R. Co. v. Mansfield, 84 Cal. 560, 24 Pac. 145.

3. Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18.

4. See COVENANTS.

5. See ESTOPPEL.

6. Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120; Wenzel v. Schultz,

may be said to come into possession under his grantor, but his entry under his grantor is not in subordination to the title which he receives from him or of that character which estops him from disputing the validity of the title under which he entered. By entering under the title he assumes it to be prima facie good, but he is not estopped thereby from showing otherwise, or from showing in any controversy another and independent title in himself.[7] Accordingly, a grantee is not estopped, by accepting a deed of confirmation of a former conveyance, from relying upon the first conveyance as passing the title.[8] But where a deed in terms declared that it was given in lieu of a previous deed, the grantee by his acceptance was held to be estopped from claiming under the previous deed.[9] It follows from the fact that the grantor of a quitclaim deed does not thereby affirm any title, that his grantee can deny that he received any estate by the deed.[10]

Matters Affecting Validity.

§ 99. In General—Deed to Charitable Organization.—An apparent consent is not real or free when obtained through duress, menace, fraud, undue influence or mistake.[11] On the other hand, a deed signed, acknowledged and delivered is one of the most solemn of civil acts, and cannot be reclaimed or avoided for light or trivial reasons;[12] such, for

100 Cal. 250, 34 Pac. 696; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187 (distinguishing Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449).

7. Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120 (distinguishing in this respect the relation of landlord and tenant and vendor and purchaser); Grattan v. Wiggins, 23 Cal. 16.

8. Tully v. Tully, 137 Cal. 60, 69 Pac. 700.

9. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

10. San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; and see supra, § 97.

11. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Civ. Code, § 1567.

12. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910;

instance, as that the grantor has changed his mind,[13] or that the deed was improvidently made.[14] A deed though executed fraudulently,[15] or obtained by fraud,[16] or duress,[17] is not, as a rule, void, but merely voidable, and is good as against a purchaser from the grantee in good faith and for a valuable consideration. But a deed which has had no inception is deemed absolutely void as a deed, as where it has never been delivered,[18] or where it had been delivered as an instrument of an entirely different character,[19] or where it has been forged.[20] In such cases the title remains in the purported grantor.[1] But an instrument is not void where the grantor understands and believes he is executing a deed of conveyance and the instrument executed differs from the one intended only in detail.[2] An analogous distinction has been made in the case of a forged acknowledgment, where the grantor never appeared before the notary, it being said that if the grantor had appeared and made some kind of an acknowledgment, the certificate would have been conclusive in favor of a purchaser in good faith.[3] The presumption is always in favor of the

Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398.

13. Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356.

14. Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356; McDonnell v. McDonnell, 10 Cal. App. 63, 101 Pac. 40.

15. Frink v. Roe, 70 Cal. 296, 11 Pac. 820.

16. Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019; Deputy v. Stapleford, 19 Cal. 302.

17. Connecticut Life Ins. Co. v. McCormick, 45 Cal. 580.

18. Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Holmes v. Salamanca G. Min. etc. Co., 5 Cal. App. 659, 91 Pac. 160.

19. Conklin v. Benson, 159 Cal. 785, 36 L. R. A. (N. S.) 537, 116 Pac. 34; Clint v. Eureka Crude Oil Co., 3 Cal. App. 463, 86 Pac. 817.

20. Cutler v. Fitzgibbons, 148 Cal. 562, 83 Pac. 1075; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486.

1. Cutler v. Fitzgibbons, 148 Cal. 562, 83 Pac. 1075.

2. Conklin v. Benson, 159 Cal. 785, 36 L. R. A. (N. S.) 537, 116 Pac. 34.

3. Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054.

validity of a deed and its recitals.[4] A deed void upon its face charges the party claiming under it with knowledge of its invalidity.[5]

Deed to charitable organization.—The provision of the code which limits the right to bequeath or devise property to, or in trust for, charitable or benevolent purposes[6] does not apply to dispositions of property by deed. Nor will a deed for that purpose be construed as a fraud upon the statute, although the grantor reserves the right to revoke or modify the same for a period of years.[7]

§ 100. Blank or Forged Deeds.—A deed which was blank when signed and which was never acknowledged, and no authority was given to sell or convey the land described therein, is absolutely void, and as ineffectual to convey title as it would have been if an entire forgery. In such case there is no ground for the application of the doctrine of estoppel in favor of a bona fide purchaser or mortgagee of the assumed grantee who has filled the blanks in the deed without authority.[8] The effect of filling in the grantee's name after delivery, or by an agent without authority before delivery, is considered in another paragraph.[9]

A forged deed is an absolute nullity and it conveys no title,[10] though it purports to have been acknowledged

4. Barry v. Sutter, 26 Cal. App. 240, 146 Pac. 527; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185.

5. Sunol v. Hepburn, 1 Cal. 254.

6. Civ. Code, § 1313. See CHARITIES, vol. 5, p. 8 et seq.

7. President etc. of Bowdoin College v. Merritt, 75 Fed. 480. For effect of reservation of right to revoke deed in general, see supra, § 192.

8. Vaca Valley etc. R. R. Co. v. Mansfield, 84 Cal. 560, 24 Pac. 145.

9. See supra, § 28. And see as to filling blanks generally, ALTERATION OF INSTRUMENTS, vol. 1, p. 1083 et seq.

10. Conklin v. Benson, 159 Cal. 785, 36 L. R. A. (N. S.) 537, 116 Pac. 34; Cutler v. Fitzgibbons, 148 Cal. 562, 83 Pac. 1075; Vaca Valley etc. R. R. Co. v. Mansfield, 84 Cal. 260, 24 Pac. 145; Morison v. Weik, 19 Cal. App. 139, 124 Pac. 869 (stating the rule but where it was found that the deed was genuine); Holmes v. Salamanca G. M. etc. Co., 5 Cal. App. 659, 91 Pac. 160.

by the grantor and has been recorded,[11] and no protection is thereby afforded to innocent third persons relying upon it.[12] But the grantor's conduct in reference to the instrument may estop him from denying its validity. As between himself and the person who committed the forgery such estoppel may not arise, but if, with knowledge of the forgery, he should declare to an innocent person that the signature was his own, and that he had executed the instrument, and thereby induced him to purchase the property, he could not afterwards claim the property upon the ground that the instrument was a forgery. And the grantor being presumed to know his own handwriting, his statement to a notary that he executed the instrument estops him from denying his declaration as well as the fact of his signature, against anyone who in reliance thereon has parted with his property; although if the notary is himself deceived, as, for instance, if another person should personate the grantor and acknowledge the signature, the title of the true owner would not be affected.[13] The procuring of the signature to a deed by trick or device, the grantor believing the paper to be a substantially different instrument, where there are no circumstances of estoppel, is as much a forgery as if the signature had been forged. But if the grantor knows he is signing a deed, though he does not have a precise idea of its contents, it is not a forgery.[14] The general subject of alteration of deeds has been treated in another article,[15] and the subject of the forgery of deeds as a crime is also treated elsewhere.[16]

§ 101. Fraud in General.—Fraud vitiates all contracts upon the principle that the party deceived never con-

11. Cutler v. Fitzgibbons, 148 Cal. 562, 83 Pac. 1075; Hager v. Spect, 52 Cal. 579.

12. Hager v. Spect, 52 Cal. 579. See, also, Blaisdell v. Leach, cited infra. As to what constitutes forgery, see Pen. Code, § 470 et seq., and the title FORGERY.

13. Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019. See infra, § 102.

14. Conklin v. Benson, 159 Cal. 785, 36 L. R. A. (N. S.) 537, 116 Pac. 34.

15. See ALTERATION OF INSTRUMENTS.

16. See FORGERY.

sented,[17] and there is no solemnity or sanctity about a deed such as to render it an exception to the rule.[18] On the contrary, fraud is a legitimate ground for avoiding a deed at all times and in all proceedings,[19] and when procured by such means a deed will be set aside,[20] or the title

17. Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356. See CONTRACTS, vol. 6, p. 68 et seq. And see FRAUD AND DECEIT.

18. Hopkins v. Beard, 6 Cal. 664; Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356.

19. Hopkins v. Beard, 6 Cal. 664.

20. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Thomas v. Hacker, 179 Cal. 731, 178 Pac. 855; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Fieg v. Gjurich, 163 Cal. 740, 127 Pac. 49 (holding the fact that grantor was in pari delicto did not bar relief where the relations were fiduciary and the conveyance was obtained by means of those relations); Martin v. Lawrence, 156 Cal. 191, 103 Pac. 913; Delcampo v. Camarilla, 154 Cal. 647, 98 Pac. 1049 (relief denied because of laches); Rianda v. Watsonville Water etc. Co., 152 Cal. 523, 93 Pac. 79 (but holding the grantor by a subsequent conveyance had deprived her representative of the right to maintain the action); Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872 (see note to Fieg v. Gjurich, supra); Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433 (see note to Fieg v. Gjurich, supra); Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Loftis v. Marshall, 124 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053 (but relief denied where the conveyance was induced through the fraudulent representations of grantor's agent, the grantee being innocent; Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Hays v. Gloster, 88 Cal. 560, 26 Pac. 367; Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382; Goodwin v. Goodwin, 59 Cal. 560 (but holding allegations of fraud in pleadings were insufficient); Deputy v. Stapleford, 19 Cal. 302; Still v. Saunders, 8 Cal. 281; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Cruickshank v. Vogh, 32 Cal. App. Dec. 722, 192 Pac. 86 (dictum); Patterson v. Patterson, 32 Cal. App. Dec. 123, 190 Pac. 483; Marron v. Marron, 49 Cal. App. 326, 125 Pac. 914; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Togni v. Taminelli, 11 Cal. App. 7, 103 Pac. 899; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892; Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Allen v. Bryant, 4 Cal. App. 371, 88 Pac. 294; Clint v. Eureka Crude Oil Co., 3 Cal. App. 463, 86 Pac. 817 (but relief denied on the ground that the grantors had not offered to do equity by returning the consideration).

The following cases support the principle stated in the text but the finding was against fraud as a

will be charged with a trust in favor of the grantor.[1] But a fraudulent intent is not to be arrived at as a presumption of law;[2] it must be proved by clear and satisfactory evidence.[3] Nor will the integrity of a deed be affected by acts done subsequent to and independent of the transaction in which it was given.[4] Fraud favored or induced by confidential relations[5] or by mental weakness,[6] especially appeals to a court of equity as ground for avoiding a deed. Thus deeds are set aside where so procured

fact; Lieman v. Golly, 178 Cal. 544, 174 Pac. 33; Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276; Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086; Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298; Smith v. Mason, 122 Cal. 426, 55 Pac. 143; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Creswell v. Welchman, 95 Cal. 359, 30 Pac. 553; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Olivas v. Olivas, 61 Cal. 382; Robins v. Hope, 57 Cal. 493; Shay v. McNamara, 54 Cal. 169; Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469; Tisdale v. Bryant, 38 Cal. App. 750, 177 Pac. 510; Worthley v. Worthley, 33 Cal. App. 473, 165 Pac. 714; Barry v. Sutter, 26 Cal. App. 240, 146 Pac. 527; Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551; McDonnell v. McDonnell, 10 Cal. App. 63, 101 Pac. 40; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Gutierrez v. Brinkerhoff, 2 Cal. Unrep. 232, 1 Pac. 482; President etc. of Bowdoin College v. Merritt, 75 Fed. 480.

See CANCELLATION OF INSTRUMENTS, vol. 4, p. 770.

1. Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; More v. More, 133 Cal. 489, 65 Pac. 1044; Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171; Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 427 (stating the rule); Duff v. Duff, 71 Cal. 513, 12 Pac. 570; Tench v. McMeekan, 17 Cal. App. 14, 118 Pac. 476; Griffith v. Godey, 113 U. S. 89, 28 L. Ed. 934, 5 Sup. Ct. Rep. 383, see, also, Rose's U. S. Notes. See infra, § 113, as to fraud consisting in the making of a promise without any intention of performing it, and as to constructive fraud resulting from a breach of confidence and trust.

2. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356. See FRAUD AND DECEIT.

3. Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356. See infra, § 233. And see FRAUD AND DECEIT.

4. Gutierrez v. Brinkerhoff, 2 Cal. Unrep. 232, 1 Pac. 482.

5. See infra, this section, as to certain specific confidential relations; and see infra, § 106. And see also as to such confidential relations, CANCELLATION OF INSTRUMENTS, vol. 4, p. 778 et seq.

6. See infra, § 103.

by the grantor's confidential agent[7] or by his partner in business,[8] or by his physician,[9] or by his trusted friend or adviser.[10] The same principle applies in transfers between husband and wife,[11] and under special circumstances of trust and confidence to transfers between brother and sister[12] and parent and child[13] and between persons living in illicit relations.[14] Constructive fraud of a grantee in confidential relations with his grantor, and arising from the breach of a promise to do something in the future, also affords ground for equitable relief against a deed given under such circumstances.[15]

§ 102. Negligence of Grantor or Grantee.—The fact that a grantor neglects to read or examine a deed presented to

7. Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486; Schultz v. McLeon, 93 Cal. 329, 28 Pac. 1053.

8. Togni v. Taminelli, 11 Cal. App. 7, 103 Pac. 899; Allen v. Bryant, 4 Cal. App. 371, 88 Pac. 294; Griffith v. Godey, 113 U. S. 89, 28 L. Ed. 934, 5 Sup. Ct. Rep. 383, see, also, Rose's U. S. Notes.

9. Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352.

10. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509.

11. Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Patterson v. Patterson, 32 Cal. App. Dec. 123, 190 Pac. 483. See infra, § 111.

12. Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Tench v. McMeekan, 17 Cal. App. 14, 118 Pac. 476.

13. Crabtree v. Potter, 150 Cal. 710, 89 Pac. 971; Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289. See infra, §§ 109, 110.

14. Fieg v. Gjurich, 163 Cal. 740, 127 Pac. 49; Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872. Procuring possession of deed by fraud without delivery, see supra, § 54; fraud through breach of trust, see supra, § 113; and see, generally, TRUSTS.

15. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108; Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984 (but holding the point did not arise under the pleadings); Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Bradley Co. v. Bradley, 37 Cal. App. 263, 173 Pac. 1011; Milloglav v. Zacharias, 33 Cal. App. 561, 165 Pac. 977; O'Brien v. O'Brien, 21 Cal. App. 620, 132 Pac. 612. See supra, § 113. See TRUSTS.

him for his execution does not prevent him from subsequently attacking it on the ground of fraud where it was represented to be an instrument of a different character, and he executed it in that belief.[16] Particularly where the instrument was supposed to be one which he had previously read and made a copy of, and it was presented by a person whom he had reason to trust.[17] And the same principle applies where a grantor negligently acknowledges a forged signature to a deed, believing the instrument to be one of an entirely different character which he had previously signed. But such deed is voidable and not void for fraud; it cannot be avoided as against innocent third persons who have parted with value in reliance upon its apparent validity.[18] Every person is presumed to read the deed under which he holds, and a failure to read its recitals will not prevent him from being charged with notice of them. If such an excuse were available as a defense against the recitals of a deed, many such instruments would rest on exceedingly frail and insecure grounds, and would result in all manner of controversies as to what covenants the parties intended should be included in the most solemn legal writings to which men may bind themselves.[19] Besides, it is a principle of the law that where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.[20] It has been held where the grantors did not well understand the English language that failure to read a deed was not a defense where they did not ask to have it read or interpreted.[1]

16. Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486 (distinguishing Hawkins v. Hawkins, 50 Cal. 558, on the ground that the parties there were dealing at arm's length); Togni v. Taminelli, 11 Cal. App. 7, 103 Pac. 899.

17. Togni v. Taminelli, 11 Cal. App. 7, 103 Pac. 899.

18. Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac 1019.

19. Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185. And see as to signing contracts in ignorance of contents, CONTRACTS, vol. 6, p. 84.

20. Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019.

1. Robins v. Hope, 57 Cal. 493.

§ 103. **Mental Weakness—Illiteracy.**—Great weakness of mind arising from infirmities of age, sickness, intoxication or any other cause, while not amounting to absolute disqualification,[2] may be accompanied by inequitable circumstances, such as grossly inadequate consideration,[3] which will justify a court of equity in setting aside the deed.[3a] If, for instance, the grantor at the time the deed is executed is actually intoxicated, the inadequacy of price is direct evidence of fraud justifying the aid of equity in annulling the grant.[4] From such facts fraud or imposition will generally be presumed.[5] Even though the grantee appears a proper object of the grantor's bounty the transaction will be closely scrutinized by a court of equity.[6] One of the indicia of a weak or disordered mind is that its possessor is quite liable to act against his own plain interest in cases where the act could not be imputed to mistake.[7] And reason for equitable interference is strengthened where it appears that the grantor was without independent advice.[8] Where actual fraud appears in such cases the right to equitable relief is, of course, conclusive.[9] But mere weak-mindedness of the grantor from

2. See supra, § 20.

3. Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298 (implied); Hays v. Gloster, 88 Cal. 560, 26 Pac. 367; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599 (stating the rule); Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Moore v. Moore, 56 Cal. 89; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914; Griffith v. Godey, 113 U. S. 89, 28 L. Ed. 934, 5 Sup. Ct. Rep. 383; see, also, Rose's U. S. Notes. (See, also, Odell v. Moss, 130 Cal. 352, 62 Pac. 555, where, although the grantor's habits of intoxication had impaired his capacity to transact business, the decision is based upon the violation of confidential relationship.)

3a. See CANCELLATION OF INSTRUMENTS, vol, 4, p. 782 et seq.

4. Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914.

5. Moore v. Moore, 56 Cal. 89; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914.

6. Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148.

7. Moore v. Moore, 56 Cal. 89; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914.

8. Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352.

9. Fieg v. Gjurich, 163 Cal. 740, 127 Pac. 49; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Loftis v.

whatever cause, unaccompanied by any other inequitable incidents, is not ground for setting aside a deed, if he had sufficient intelligence to understand the nature of the transaction and was left to act upon his own free will.[10] While courts are disposed to relieve elderly persons from their improvident acts on any substantial showing of overreaching or fraud,[11] still they cannot, from motives of sympathy, annul deeds executed freely and voluntarily with full knowledge and understanding of the nature of the transaction.[12] And the fact that the grantor was far advanced in years raises no presumption that he did not understand the nature of the conveyance, or that he was incapable of resisting the influence of the grantee.[13]

§ 104. Undue Influence Generally.—Deeds obtained by undue influence as defined by the code[14] will be set aside in equity.[15] But undue influence in its legal sense must

Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

10. Lieman v. Golly, 178 Cal. 544, 174 Pac. 33; Creswell v. Welchman, 95 Cal. 359, 30 Pac. 553; Rogers v. Scott, 28 Cal. App. 93, 151 Pac. 379; Barry v. Sutter, 26 Cal. App. 240, 146 Pac. 527; Broaddus v. James (Monroe), 13 Cal. App. 464, 110 Pac. 158; McDonnell v. McDonnell, 10 Cal. App. 63, 101 Pac. 40; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190.

A deed is good, though by reason of illiteracy and want of experience and knowledge of business affairs, the grantor was not able, unassisted, to take care of her property and by reason thereof was liable to be deceived and imposed upon by designing persons, where it was free, voluntary and with full knowledge of facts. Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910.

11. Cruickshank v. Vogh, 32 Cal. App. Dec. 722, 192 Pac. 86.

12. Creswell v. Welchman, 95 Cal. 359, 30 Pac. 553; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Cruickshank v. Vogh, 32 Cal. App. Dec. 722, 192 Pac. 86; Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312; Broaddus v. James (Monroe), 13 Cal. App. 464, 110 Pac. 158; McDonnell v. McDonnell, 10 Cal. App. 63, 101 Pac. 40.

13. Rogers v. Scott, 28 Cal. App. 93, 151 Pac. 379.

14. See Civ. Code, § 1575; CONTRACTS, vol. 6, p. 70; and see FRAUD AND DECEIT. As applied to testamentary dispositions, see WILLS; and to trustees in relation to their beneficiaries, see Civ. Code, § 2231. See, also, TRUSTS.

15. See infra, § 105. And see CANCELLATION OF INSTRUMENTS, vol. 4, p. 777.

amount to force or coercion destroying the free agency of the grantor.[16] As thus exercised upon the grantor it is something wrongful, a species of fraud,[17] whereby the will of the grantee is substituted for that of the grantor.[18] The undue influence must exist at the time of the act,[19] and be a controlling influence in impelling the execution of the deed.[20] The question is not whether the grantor knew what he was doing, had done, or proposed to do, but how his intention was produced.[1] Argument and influence, as well as acts of kindness, attention and affection, may fairly be used to secure the execution of a deed. And mere advice, persuasion or entreaty do not constitute undue influence; certainly where there is no fiduciary relation, and no fraud, coercion or other improper or prohibited means are employed.[2] Hence, it is not enough to vitiate a deed that it was executed under the influence of affection and attachment, or from the mere desire of gratifying the wishes of another.[3]

§ 105. Effect of Undue Influence—Mental Weakness.—A deed obtained by means of undue influence or domination over the mind of the grantor will, upon proper and seasonable application of the injured party or his repre-

16. Goodwin v. Goodwin, 59 Cal. 560; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Penn. Mut. Life Ins. Co. v. Union Trust Co., 83 Fed. 891; President etc. of Bowdoin College v. Merritt, 75 Fed. 480.

17. Tanforan v. Tanforan, 173 Cal. 270, 159 Pac. 709 (but holding that a cause of action for cancellation based upon undue influence is wholly separate from that based upon either fraud or duress); Goodwin v. Goodwin, 59 Cal. 560 (question of sufficiency of complaint to set aside deed); Williamson v. Williamson, 41 Cal. App. 721, 183 Pac. 301; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; President of Bowdoin College v. Merritt, 75 Fed. 480.

18. Pennsylvania Mut. Life Ins. Co. v. Union Trust Co., 83 Fed. 891.

19. Pennsylvania etc. Ins. Co. v. Union Trust Co., 83 Fed. 891.

20. Goodwin v. Goodwin, 59 Cal. 560 (question of sufficiency of complaint to set aside deed); Pennsylvania etc. Ins. Co. v. Union Trust Co., 83 Fed. 891.

1. Ross v. Conway, 92 Cal. 632, 28 Pac. 785.

2. President etc. of Bowdoin College v. Merritt, 75 Fed. 480.

3. Goodwin v. Goodwin, 59 Cal. 560.

sentatives or heirs, be set aside by a court of equity,[4] the ground of relief being that one party, by improper means or practices, has gained an unconscionable advantage over

4. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Tanforan v. Tanforan, 173 Cal. 270, 159 Pac. 709 (implied, but holding undue influence was not ground for relief under a complaint which merely alleged duress and fraud); Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Suhr v. Lauterbach, 164 Cal. 591, 130 Pac. 591; Fieg v. Gjurich, 163 Cal. 740, 127 Pac. 49; Crabtree v. Potter, 150 Cal. 710, 89 Pac. 971; Doherty v. Courtney, 150 Cal. 606, 89 Pac. 439; Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777; Green v. Duvergey, 146 Cal. 378, 80 Pac. 234; Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Trubody v. Trubody, 137 Cal. 172, 69 Pac. 968; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Moore v. Moore, 81 Cal. 195, 22 Pac. 589; Goodwin v. Goodwin, 59 Cal. 560 (but holding complaint insufficient); Moore v. Moore, 56 Cal. 89; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Soule v. Wyatt, 30 Cal. App. 778, 159 Pac. 447; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; Allen v. Bryant, 4 Cal. App. 371, 88 Pac. 294.

The following cases support the principle stated in the text, but the findings were against undue influence as a fact: Lieman v. Golly, 178 Cal. 544, 174 Pac. 33; U. S. Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901; Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Schuur v. Rodenbeck, 133 Cal. 85, 65 Pac. 298; Smith v. Mason, 122 Cal. 426, 55 Pac. 143; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Creswell v. Welchman, 95 Cal. 359, 30 Pac. 553; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Williamson v. Williamson, 41 Cal. App. 721, 183 Pac. 301; Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469; Veirs v. Roberts, 39 Cal. App. 684, 179 Pac. 689; Rogers v. Scott, 28 Cal. App. 93, 151 Pac. 379; Barry v. Sutter, 26 Cal. App. 240, 146 Pac. 527; Silveria v. Alexander, 25 Cal. App. 506, 144 Pac. 303; Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356; Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551; McDonnell v. McDonnell, 10 Cal. App. 63, 101 Pac. 40; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398; De Wolf v. Hays, 125 U. S. 614, 31 L. Ed. 818, 8 Sup. Ct. Rep. 990; President etc. of Bowdoin College v. Merritt, 75 Fed. 480.

another.[5] Courts of equity closely scrutinize those cases where, as a result of advanced age, feebleness and physical suffering, a grantor is more tractable, and therefore more susceptible to extrinsic pressure or influences than he would be under normal circumstances or conditions,[6] and where it is found that one has obtained an undue advantage over such a person by deed, through undue pressure or influence, the deed will be set aside in equity,[7] even though there is no proof of intentional fraud or deceit,[8] upon a motive of general public policy.[9] Evidence of a grantor's mental condition both before and after the date of a deed is admissible on the issue of undue influence to show his susceptibility to such influence.[10]

§ 106. Confidential Relations.—It is a familiar rule of equity that one who holds a confidential relation towards another cannot use that relation for his own advantage.[11]

5. President etc. of Bowdoin College v. Merritt, 75 Fed. 480.

6. Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

7. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Fieg v. Gjurich, 163 Cal. 740, 127 Pac. 49; De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059; Doherty v. Courtney, 150 Cal. 606, 89 Pac. 434; Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Trubody v. Trubody, 137 Cal. 172, 69 Pac. 968 (question of sufficiency of complaint); Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Moore v. Moore, 81 Cal. 195, 22 Pac. 589, 874 (decision on first appeal 56 Cal. 89); Richards v. Donner, 72 Cal. 207, 13 Pac. 584; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Heitman v. Bruns, 37 Cal. App. 489, 174 Pac. 67; Soule v. Wyatt, 30 Cal. App. 778, 159 Pac. 447; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; and see other cases cited supra and infra, this section.

8. Richards v. Donner, 72 Cal. 207, 13 Pac. 584; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148.

9. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

10. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148.

11. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 569; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Payne v. Payne, 12 Cal. App. 251, 107 Pac.

Hence, where one acts under the influence and domination of another standing in a relation of trust and confidence, and the conveyance is obtained by means of that very relation, equity will not enter into an investigation of the extent to which such influence has been exercised,[12] but will always cancel the deed.[13] Within the rule above stated, such relation is deemed to exist between trustee and cestui que trust,[14] principal and agent,[15] attorney and client,[16] parent and child,[17] husband and wife,[18] and between one and his spiritual adviser.[19] But it is not every case where parties trust each other that the law recognizes as confidential within this rule.[20] Thus the relation of brother and sister,[1] or of first cousins,[2] cannot

148. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 770 et seq.; CONTRACTS, vol. 6, p. 72 et seq. See, generally, Civ. Code, § 2231, and TRUSTS.

12. Ross v. Conway, 92 Cal. 632, 28 Pac. 785.

13. Fieg v. Gjurich, 163 Cal. 740, 127 Pac. 49; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Bradley Co. v. Bradley, 37 Cal. App. 263, 173 Pac. 1011; Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; approved in Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190.

14. Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190 (naming as further instances of persons holding confidential relations, client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, partners and copartners, master and servant, physician and patient); and see, also, Robins v. Hope, 57 Cal. 493, and Bradley Co. v. Bradley, 37 Cal. App. 263, 173 Pac. 1011, for similar enumerations; Civ. Code, §§ 2228, 2231; see, generally, TRUSTS.

15. De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

16. U. S. Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901; Sanguinetti v. Rossen, 12 Cal. App. 623, 107 Pac. 560.

17. See infra, §§ 109, 110

18. See infra, § 111.

19. Doherty v. Courtney, 150 Cal. 606, 89 Pac. 434; Ross v. Conway, 92 Cal. 632, 28 Pac. 785.

20. Taylor v. Kelly, 103 Cal. 178, 37 Pac. 216; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

1. Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384.

2. Robins v. Hope, 57 Cal. 493.

be said to be confidential or fiduciary as matter of law; though blood relationship is to be taken into consideration with other evidence bearing upon the question.[3] And it seems that confidential relations between a grantor and the agent of the grantee, if the latter is ignorant of such relation, does not constitute a confidential relation between the principal parties.[4]

§ 107. Necessity for Independent Advice.—Ordinarily, persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them.[5] However, it is not essential in all cases of confidential relations, even where the utmost good faith is required to be shown, that before a transaction can be shown to be valid and binding, the confiding party must indispensably have had independent advice.[6] The circumstances as to independent advice is to be regarded as bearing upon the question whether the deed is the voluntary act of the grantor,[7] and as an important

3. Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384.

4. Robins v. Hope, 57 Cal. 493. See also as to confidential relations, CANCELLATION OF INSTRUMENTS, vol. 4, p. 778 et seq.

5. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Soberanes v. Soberanes, 106 Cal. 1, 39 Pac. 39, 527 (per Beatty, C. J.); Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Moore v. Moore, 81 Cal. 195, 22 Pac. 589; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348. The advice should be given in private by someone of the grantor's own selection, and when the grantor is not surrounded with dominating influences favoring the transfer. Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Piercy v. Piercy, supra.

6. Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158 (sub nom. Broaddus v. Monroe); Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190.

7. Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158.

element to be considered by the trial court in determining the status of the property conveyed.[8] The general principle applies only in cases where the grantee seeks to obtain some benefit or advantage for himself. Where the transfer is not for his benefit or at his solicitation, it is sufficient that the grantor had an opportunity to obtain independent advice, or that he was not prevented from doing so, that he fully comprehended what he was doing, and that it was his own voluntary act.[9]

§ 108. Presumption of Undue Influence in General.— The burden of proving that a deed has been obtained by fraud, mistake or undue influence is ordinarily upon the person attacking it.[10] But while it is not impossible that a deed between persons as to whom a relation of trust and confidence exists may be valid, yet, such a transaction, where the grantee obtains a benefit or advantage, is constructively fraudulent, and is only to be upheld upon a showing of special circumstances.[11] But a mere relation of trust and confidence is not sufficient of itself to raise the presumption of invalidity.[12] And a voluntary con-

8. Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158.

9. Moore v. Moore, 56 Cal. 89.

10. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086; Barry v. Sutter, 26 Cal. App. 240, 146 Pac. 527; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551.

11. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509 (the court saying that the presumption might be sufficient to support a finding of fraud, in spite of the grantee's evidence tending to show the contrary); United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Hayne v. Herman, 97 Cal. 259, 32 Pac. 171; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Williamson v. Williamson, 41 Cal. App. 721, 183 Pac. 301; Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469; Silveria v. Alexander, 25 Cal. App. 506, 144 Pac. 303; Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; President etc. of Bowdoin College v. Merritt, 75 Fed. 480. See, also, Civ. Code, § 2235.

12. Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469.

veyance is not prima facie fraudulent.[13] The circumstances under which the conveyance was made, the physical condition of the grantor,[14] the absence of adequate consideration,[15] and the seeming injustice to the grantor and his heirs if the deed is upheld,[16] may cast on the grantee the burden of showing the absence of undue influence.[17] But where an adequate motive for making a deed is apparent, want of consideration does not necessarily militate against the bona fides of the transaction.[18]

13. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398; Harris v. Harris, 59 Cal. 620; Gillan v. Metcalf, 7 Cal. 137.

14. Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914 (weakness of mind of grantor resulting from intoxication).

15. Campbell v. Genshlea, 180 Cal. 213; Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Moore v. Moore, 56 Cal. 89; Lynch v. Lynch, 22 Cal. App. 653, 135 Pac. 1101 (the court saying that where to the fact of inadequate consideration there is added the circumstance of confidential relationship, the invalidation of the transfer is, in the eyes of a court of equity, well-nigh complete; see, also, Carty v. Connolly, supra); Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914 (a grossly inadequate consideration may be evidence of the condition of the grantor's mind at the time of signing the deed); Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158 (declarations of mother before execution of a deed as to value of services rendered by grantee held admissible to show consideration); Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348.

16. Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914.

17. Hays v. Gloster, 88 Cal. 560, 26 Pac. 367; Richards v. Donner, 72 Cal. 207, 13 Pac. 584 (basing the rule on both English and American authority; for prior opinion in department, see 2 Cal. Unrep. 675, 11 Pac. 740, 770); Moore v. Moore, 56 Cal. 89 (question of sufficiency of complaint to cancel deed; see 81 Cal. 195, 22 Pac. 589, 874, for decision on second appeal); McDonnell v. McDonnell, 10 Cal. App. 62, 101 Pac. 40 (but holding the inference was rebutted in this instance).

A breach of a promise made to one under confidential relations who executes a deed in reliance thereon may raise a presumption that the transaction was induced by undue influence. Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

18. Robins v. Hope, 57 Cal. 493.

And where no confidential relation exists between the grantor and grantee, no presumption against the validity of the transfer arises.[19]

§ 109. Deed from Parent to Child.—The relation of parent and child, where business transactions are carried on between them, though not strictly fiduciary,[20] is the source of the very highest considerations of confidence and trust.[1] But transactions between parent and child are as legitimate as those had between strangers,[2] and the mere relation of parent and child and opportunity of the latter to exercise undue influence does not raise the presumption that a deed from the parent to the child was the result of undue influence, or render the deed presumptively invalid.[3] Such relation and opportunity for the exercise of undue influence is merely a circumstance inviting a careful consideration of the transaction,[4] and is a proper matter to take into consideration with other evidence.[5] Even where the parent is aged, infirm or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority,

19. Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276. See, generally, FRAUD AND DECEIT.

20. Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183.

1. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183.

2. Lynch v. Lynch, 22 Cal. App. 653, 135 Pac. 1101.

3. Smith v. Mason, 122 Cal. 426, 55 Pac. 143; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469 (principle applied where grantor stood in loco parentis to grantee; decision based upon Estate of Ricks, 160 Cal. 461, 117 Pac. 532, a case involving a will); Lynch v. Lynch, 22 Cal. App. 653, 135 Pac. 1101; Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158 (sub nom. Broaddus v. Monroe); Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398.

A voluntary deed executed by a parent to her child, free from any imputation of undue influence and with full knowledge and understanding, is valid. Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Veirs v. Roberts, 39 Cal. App. 684, 179 Pac. 689.

4. Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158.

5. Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469 (grantor in loco parentis to grantee).

the validity of a voluntary conveyance to the child turns upon the exercise of actual undue influence and not upon any presumption of invalidity.[6] But where a child gains an advantage or obtains title to the parent's property without adequate or any consideration, the transaction should, upon principles of equity and fair dealing, be scanned with the greatest scrutiny.[7] And, a fortiori, should such transaction be examined circumspectly when the parent is aged and mentally infirm, even though not altogether incompetent,[8] and where there are other children, for the exclusion of whom from the parent's estate no reasonable account is given or apparent.[9] In such cases the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge on the part of the grantor of all the facts, and of the effect of the transfer.[10]

6. Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158; Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190 (citing, in each instance, 2 Pom. Eq. Jur., § 962. Compare Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336).

7. Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

8. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

9. Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Soule v. Wyatt, 30 Cal. App. 778, 159 Pac. 447 (inferred); Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

10. De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059; Crabtree v. Potter, 150 Cal. 710, 89 Pac. 971 (holding that a deed obtained from a parent by fraud raises a constructive trust in the grantee); Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910 (sustaining the deed in this instance); Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Soule v. Wyatt, 30 Cal. App. 778, 159 Pac. 447 (setting aside deed and distinguishing Soberanes v. Soberanes, supra); Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158 (implied); Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398. See WILLS for application of this principle to devises, etc.

While personal services rendered by a child to its parent are presumed to be gratuitous, yet where a deed is given under such circumstances as justify an inference that it was given in consideration of such services rendered and to be rendered, the presumption is rebutted and no express contract is necessary for such purpose. Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158.

§ 110. **Deed from Child to Parent, or One in Loco Parentis.**—A deed by a child to its parent is good if not tainted with parental influence. "A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. While the dominion lasts it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift."[11] Such dominion or control over the child may be such as to impeach the validity of the transaction, though the child is an adult, as where a girl of nineteen deeded property to her grandparents who stood in the double relation of parents and guardians of the grantor's person and estate;[12] and where a married son, while in an intoxicated condition, conveyed property to his mother;[13] the circumstances in each case being such as to throw suspicion on the transaction.[14]

§ 111. **Between Husband and Wife.**—The relation of husband and wife is expressly declared by the code to be confidential, and conveyances by one to the other are subject to the general principles applicable to persons occupying trust relations,[15] and preclude either from obtaining any advantage over the other by means of misrepresentation, concealment or adverse pressure.[16] The marriage

11. Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190 (dicta, quoting 2 Pom. Eq. Jur., § 962).

12. Brown v. Burbank, 64 Cal. 99, 27 Pac. 940.

13. Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914.

14. See note, 11 A. L. R. 735, as to fraud or undue influence in conveyance from child.

15. Civ. Code, §§ 158 and 2228.

16. Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4 (holding that the mere fact that a pending divorce action did not destroy the relation or obligation arising therefrom); Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957 (applying Civ. Code, §§ 158, 2231, 2234 and 2235); Brison v. Brison, 90 Cal. 323, 27 Pac. 186 (citing Civ. Code, § 1575, subd. 1. See § 104, supra); Brison v. Brison, 75 Cal.

relation does not ipso facto raise the presumption that a deed of conveyance from the husband to the wife has been the result of undue influence,[17] but such deed prima facie conveys to the wife whatever according to the rules of conveyancing its terms embrace.[18] The same rule in this respect is applicable to deeds as in wills.[19] Similarly, the execution of a deed by a wife to her husband though coupled with an entire want of consideration, will not be presumed from their relation alone as husband and wife to have been obtained by undue influence.[20] The proof must go further and show the unnaturalness or the unreasonableness of the transaction, such as will tend to show that the husband made use of the confidence reposed in him by the wife for the purpose of obtaining an unfair advantage over her. The confidential relation, however, is one of the facts to be considered with other facts of the case.[1]

Undue influence through illicit relations, or by third person.—A deed obtained by undue influence acquired through illicit relations,[2] or obtained from a wife in favor of a third person through the undue influence of the husband,[3] may be canceled in equity.

525, 7 Am. St. Rep. 189, 17 Pac. 689; Williamson v. Williamson, 41 Cal. App. 721, 183 Pac. 301.

17. Wilcox v. Wilcox, 171 Cal. 770, 155 Pac. 95; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543; Stiles v. Cain, 134 Cal. 170, 66 Pac. 231 (principle applied to executory contract); Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

18. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

19. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691. See WILLS.

20. McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

1. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348.

2. Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872.

3. Moore v. Moore, 81 Cal. 195, 22 Pac. 589, 874; De Wolf v. Hayes, 125 U. S. 614, 31 L. Ed. 818, 8 Sup. Ct. Rep. 990 (but holding facts insufficient to show undue influence in this case).

§ 112. Misrepresentation and Concealment.—The principles of fraud and their application are fully considered in another article,[4] but it may be stated generally that to constitute grounds for setting aside a deed the representations must be false,[5] and made with the intent to deceive,[6] or in a manner not warranted by the information of the party making them.[7] Moreover, such representations must be as to matters of fact and not of mere opinion,[8] material, as an inducement to the execution of the deed,[9] and they cannot be predicated upon a mere statement of intention or promise made in good faith to do an act in the future.[10] Examples of fraudulent misrepre-

4. See, generally, FRAUD AND DECEIT.

5. Thomas v. Hacker, 179 Cal. 731, 178 Pac. 855; Hayes v. Gloster, 88 Cal. 560, 26 Pac. 367; Worthley v. Worthley, 33 Cal. App. 473, 165 Pac. 715; Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659.

A false representation by a woman that she is unmarried, or of good moral character, by which marriage and a conveyance in the nature of a prenuptial settlement is induced, has been held not such fraud as to constitute ground for setting the deed aside. Wilcox v. Wilcox, 171 Cal. 770, 155 Pac. 95; Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904. And see Bretthauer v. Foley, 15 Cal. App. 19, 113 Pac. 356, where it was held that there was no fraud or undue influence in the procurement of a deed.

6. Hayes v. Gloster, 88 Cal. 560, 26 Pac. 367; Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659.

7. Civ. Code, § 1572.

If the parties had equal knowledge or means of information as to the fact or facts misrepresented equity will not as a rule interfere. Robins v. Hope, 57 Cal. 493 (holding the grantor was presumed to know the state of his own title, hence a misrepresentation as to this fact could not be misleading and therefore fraudulent); Board of Commissioners v. Younger, 29 Cal. 172.

But it has been held that mere concealment of facts will not constitute fraud unless they are such as a person is under a duty to disclose. Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; Board of Commissioners v. Younger, 29 Cal. 172.

8. Thomas v. Hacker, 179 Cal. 731, 178 Pac. 855; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382.

9. Thomas v. Hacker, 179 Cal. 731, 178 Pac. 855; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382; Board of Commissioners v. Younger, 29 Cal. 172; Worthley v. Worthley, 33 Cal. App. 473, 165 Pac. 715; Tench v. McMeekan, 17 Cal. App. 14, 118 Pac. 476; Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659.

10. See infra, § 113.

sentations invalidating a deed are where they have been made as to the character or value of the consideration,[11] or as to the nature, contents or effect of the deed or instrument,[12] or as to the purpose or motive of the conveyance.[13] And where the grantee named in a deed of a homestead, executed by husband and wife, was only the ostensible purchaser, the real purchaser fraudulently attaching the purchase money in a suit against the husband alone, after delivery of the deed and before payment, it was held equity would cancel the deed.[14] Likewise a voluntary deed may be avoided where induced by the false representation that the property of the grantor was about to be charged with personal liaibilities or taken under judicial process.[15]

§ 113. Promise With and Without Intention to Perform.—The failure to perform parol promises to do something in the future made by a grantee in good faith, contemporaneously with the execution of the deed, will not ordinarily constitute fraud and ground for setting the

11. Thomas v. Hacker, 179 Cal. 731, 178 Pac. 855; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486; Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659; Allen v. Bryant, 4 Cal. App. 371, 88 Pac. 294.

12. Conklin v. Benson, 159 Cal. 785, 36 L. R. A. (N. S.) 537, 116 Pac. 34; Del Campo v. Camarillo, 154 Cal. 647, 98 Pac. 1049; Rianda v. Watsonville Water etc. Co., 152 Cal. 523, 93 Pac. 79 (but holding the grantor's representative had no right to maintain the action, his intestate having made a subsequent conveyance of the property); Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486; Loftus v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Worthley v. Worthley, 33 Cal. App. 473, 165 Pac. 715; Togni v. Taminelli, 11 Cal. App. 7, 103 Pac. 899; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892; Holmes v. Salamanca G. M. etc. Co., 5 Cal. App. 659, 91 Pac. 160.

13. Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053; Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892.

14. Still v. Sanders, 8 Cal. 281.

15. Fieg v. Gjurich, 163 Cal. 740, 127 Pac. 49; Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872; Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659 (the court refusing to indulge the presumption that the grantor's purpose was to defraud any creditor).

deed aside,[16] even though the future promise constitutes the consideration in whole or in part, where the grantor waives actual performance as a condition of vesting the title, or as in any way affecting the validity of the deed.[17] The grantor's only remedy in such cases is to recover damages for the breach.[18] Acts done subsequent to the execution of the deed do not as a rule affect its integrity.[19] But a promise made by the grantee with no intention at the time of performing it constitutes actual fraud for which the deed may be avoided.[20] Consequently, the acceptance of a deed subject to conditions to be performed by the grantee, and upon which the grantor relies, constitutes fraud where the acceptance is in bad faith without

16. Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382; Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 427; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Hartman v. Reed, 50 Cal. 485; Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156.

17. Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382 (holding Civ. Code, § 1689, providing for rescission of contracts for failure of consideration did not apply); Hartman v. Reed, 50 Cal. 485. For effect of total or partial failure of consideration, see supra, §§ 42, 43.

18. Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382; Hartman v. Reed, 50 Cal. 485.

19. Tisdale v. Bryant, 38 Cal. App. 750, 177 Pac. 510.

20. Civ. Code, § 1572; Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Martin v. Lawrence, 156 Cal. 191, 103 Pac. 913; Crabtree v. Potter, 150 Cal. 710, 89 Pac. 971; Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053; Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Hays v. Gloster, 88 Cal. 560, 26 Pac. 367; Nordholt v. Nordholt, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Paterson v. Paterson, 32 Cal. App. Dec. 123, 190 Pac. 483; Williamson v. Williamson, 41 Cal. App. 721, 183 Pac. 301; Tisdale v. Bryant, 38 Cal. App. 750, 177 Pac. 510 (but holding the point was not raised by the pleadings); Bradley Co. v. Bradley, 37 Cal. App. 263, 173 Pac. 1011; O'Brien v. O'Brien, 21 Cal. App. 620, 132 Pac. 612; Tench v. McMeekan, 17 Cal. App. 14, 118 Pac. 476; Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312 (implied); Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659.

intention on the part of the grantee to perform the conditions.[1] And where the execution of a deed has been induced by a fiduciary or confidential relation between the parties, and there is an inadequate or an entire want of consideration, the grantee expressly or by implication promising to perform some act, his failure to perform the act will be a constructive fraud, which will invalidate the deed although the promise was made in good faith.[2]

§ 114. Fraud of Third Person.—It is an established rule of law that a grantor cannot question his own conveyance upon the ground that a third party practiced a fraud upon him not known to or participated in by the grantee.[3] If, however, the grantee was a party to the fraud the deed may be set aside.[4] Likewise, the deed may be set aside because of the fraud of one who acted in the transaction as the agent of the grantee. Upon the same principle where the third person acted as the agent of both

1. Crabtree v. Potter, 150 Cal. 710, 89 Pac. 971; Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Whitaker v. Regents of U. of C., 39 Cal. App. 111, 178 Pac. 308 (but holding there was no evidence of fraud in this case).

If the evil intent exists it is immaterial whether there was a confidential relation or not. Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

2. Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430; Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506; Fagen v. Lentz, 156 Cal. 681, 20 Ann. Cas. 221, 105 Pac. 951; Jones v. Jones, 140 Cal. 587, 74 Pac. 143 (in an action by the grantor to establish her title and the invalidity of the deeds, it was held that a decree declaring her the owner was substantially correct and without prejudicial error, though it might have ordered a cancellation or reconveyance); Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691 (but the grantor can take no advantage of the breach of promise where he gave the grantee no opportunity to comply with it); Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171; Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521. See FRAUD AND DECEIT; TRUSTS.

3. Conklin v. Benson, 159 Cal. 785, 36 L. R. A. (N. S.) 537, 116 Pac. 34; Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053; De Arnaz v. Escandon, 59 Cal. 486.

4. Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 756.

parties and his false representations were made to the grantor in his capacity as his agent and not as the agent of the grantee, and the grantor so understood the fact, the latter is not entitled to have the deed set aside. The principle here applied is that where the loss to one of two innocent persons is caused by the fraud of a third person, the one who accredited him must be the sufferer.[5] However, the fraud of a third person in inducing the execution of a deed does not affect its operative force as a conveyance of the title unless the necessary steps have been taken to avoid the deed on that ground.[6]

§ 115. **Mistake.**—Inasmuch as consent is not real when obtained to the execution of a deed through mistake,[7] where a mistake has been made in a material respect[8] equity will give relief either by canceling the deed,[9] or by reforming it to represent the true intent of the parties.[10]

5. Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053. See, generally, FRAUD AND DECEIT.

6. Peres v. Sunol, 1 Cal. Unrep. 647.

7. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Ferguson v. Ash, 27 Cal. App. 375, 150 Pac. 657; Civ. Code, § 1567. See FRAUD AND DECEIT.

8. Home & Farm Co. v. Freitas, 153 Cal. 680, 96 Pac. 308; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Sullivan v. Moorhead, 99 Cal. 157, 33 Pac. 796; Stewart v. Sutherland, 93 Cal. 270, 28 Pac. 947; Richards v. Donner, 72 Cal. 207, 13 Pac. 584; Leonis v. Lazzarovich, 55 Cal. 52; Lestrade v. Barth, 19 Cal. 660; Allen v. Bryant, 4 Cal. App. 371, 88 Pac. 294; Kinney v. Consol. Virginia M. Co., 4 Sawy. 382, Fed. Cas. No. 7827.

Mistake as to quantity is not ground for action unless it is made to appear beyond controversy that quantity constituted one of the principal conditions, and not merely as an inducement to the contract or grant. Board of Commissioners v. Younger, 29 Cal. 172 (approved in Harding v. Robinson, 175 Cal. 534, 166 Pac. 808).

9. Crow v. Crow, 168 Cal. 607, 143 Pac. 689; Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Richards v. Donner, 72 Cal. 207, 13 Pac. 584; Hearst v. Pujol, 44 Cal. 230; Barry v. Sutter, 26 Cal. App. 240, 146 Pac. 527 (implied). See CANCELLATION OF INSTRUMENTS, vol. 4, p. 783.

The fraud may be constructive, as where a mistake by one party is known or suspected by the other, Los Angeles etc. R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029; Allen v. Bryant, 4 Cal. App. 371, 88 Pac. 294.

10. Los Angeles etc. R. R. Co. v. New Liverpool Sale Co., 150 Cal. 21,

It is proper to say that in general, unless the mistake was mutual, or was accompanied by fraud, the parties are to be governed by the terms of the deed as it was executed.[11] And equity will not ordinarily give relief to a party where the mistake was the result of his own inexcusable neglect.[12] Pursuant to the principles above stated relief may be granted for mistake where the deed did not convey all the land intended;[13] or where the deed conveyed more land than was intended.[14]

Extrinsic evidence is admissible to show a mistake in the placing of title in a certain grantee.[15] So, evidence of conduct and declarations of the grantor while in occu-

87 Pac. 1029; Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005; Eureka v. Gates, 137 Cal. 89, 69 Pac. 850; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Eva v. McMahon, 77 Cal. 467, 19 Pac. 872; Lestrade v. Barth, 19 Cal. 660; Civ. Code, § 3399. See CONTRACTS, vol. 6, p. 83; REFORMATION OF INSTRUMENTS.

11. Los Angeles etc. R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029; Eureka v. Gates, 137 Cal. 89, 69 Pac. 850; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; De Arnaz v. Escandon, 59 Cal. 489; Funded Debt Commrs. of San Jose v. Younger, 29 Cal. 172 (distinguished from Quarg v. Scher, 136 Cal. 406, 69 Pac. 96, partly on the ground that the transaction in the principal case was an executed contract); Lestrade v. Barth, 19 Cal. 660; Eshleman v. Henrietta Vineyard Co., 4 Cal. Unrep. 584, 36 Pac. 775.

12. Eshleman v. Henrietta Vineyard Co., 4 Cal. Unrep. 584, 36 Pac. 775; Kinney v. Consolidated Virginia M. Co., 4 Sawy. 382, Fed. Cas. No. 7827.

13. Danielson v. Neal, 164 Cal. 748, 130 Pac. 716 (holding the words "more or less" in the description did not affect the right to equitable relief). Sullivan v. Moorhead, 99 Cal. 157, 33 Pac. 796.

14. Home & Farm Co. v. Freitas, 153 Cal. 680, 96 Pac. 308; Los Angeles etc. R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029; Eva v. McMahon, 77 Cal. 467, 19 Pac. 872 (relief here was available though the excess was known to both parties, the description being used for convenience); Barfield v. Price, 40 Cal. 535; Ferguson v. Ash, 27 Cal. App. 375, 150 Pac. 657. A mistake made by including in a husband's deed the separate property of the wife, the latter joining in the deed merely to strengthen the title of the husband, is available to the wife's devisee; Ferguson v. Ash, 27 Cal. App. 375, 150 Pac. 657 (distinguished from Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005, in which the equities between the grantee and the heir of the grantor were held to be equal. See, generally, VENDOR AND PURCHASER).

15. Parks v. Parks, 179 Cal. 472, 177 Pac. 455. As to mistake in the name of the grantee, see supra,

pation of the premises conveyed is admissible to show mistake.[16] And a mistake in description appearing on the face of the deed may be corrected by parol evidence.[17]

§ 116. Duress.—Under the rule of legal duress which implies that a party has been unlawfully constrained by another to perform an act under circumstances which prevent the exercise of free will,[18] upon proper application equity will set aside a deed[19] obtained by threats of defamation of character,[20] or where otherwise a conveyance was obtained by such means, which in view of the circumstances, amounted to legal duress.[1] A deed obtained by means of duress is not, however, void but merely voidable, hence one taking title from the grantee in good faith and for a valuable consideration is protected.[2] The act of the party compelling the unwilling obedience of another must be unlawful or wrongful, and there can be no duress in law where the act done or threatened is nothing more than what the party had a legal right to do.[3]

VII. CONSTRUCTION.

§ 117. In General.—Whether a deed passes title or not must be determined by its legal effect. If it has been executed and delivered, its effect is to be determined by its

§ 31; and as to mistake in the matter of delivery, see supra, § 54.

16. Lestrade v. Barth, 19 Cal. 660.

17. Wagenblast v. Washburn, 12 Cal. 208.

18. See DURESS.

19. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Suhr v. Lauterbach, 164 Cal. 591, 130 Pac. 2; Nordholt v. Nordholt, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599 (holding the duress must be pleaded as well as proved). And see cases cited infra. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 777.

20. Wickland v. Wickland, 19 Cal. App. 559, 126 Pac. 507.

1. Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4.

2. Connecticut Life Ins. Co. v. McCormick, 45 Cal. 580; Deputy v. Stapleford, 19 Cal. 302.

3. Tisdale v. Bryant, 38 Cal. App. 750, 177 Pac. 510. See, generally, DURESS.

language.[4] It is impossible to lay down an invariable and universal rule of construction of deeds.[5] Under a provision of the code, "Grants are to be construed in like manner with contracts in general, except so far as is otherwise provided in" article IV, chapter I, title IV, of the Civil Code.[6] And the rule has been frequently declared by the courts.[7] These rules for the interpretation of contracts, for the most part, are parts of the common law previously existing, and are applicable to deeds and other contracts executed prior to the adoption of the codes as fully as those executed since.[8] But while all the rules of interpretation must be considered, and each given its proper weight where necessary to arrive at the true effect of a deed,[9] arbitrary and technical rules of construction are not to be invoked if the intention of the parties can be plainly discovered without their aid,[10] nor for the purpose of defeating the manifest intention of the grantor.[11] For example, the rules governing the location of boundaries are not generally absolute rules of law to be applied

4. Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Mowry v. Heney, 86 Cal. 471, 25 Pac. 17.

5. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256.

6. Civ. Code, § 1066, the article specified comprising §§ 1066–1072.

7. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047; Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Pulliam v. Bennett, 55 Cal. 368; Kimball v. Semple, 25 Cal. 440; MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248; Sherriff v. Sherriff, 32 Cal. App. 681, 163 Pac. 878; Whitcomb v. Worthing, 30 Cal. App. 629, 159 Pac. 613; East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634; Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935; Jacobs v. All Persons etc., 12 Cal. App. 163, 106 Pac. 896; Peterson v. Machado, 5 Cal. Unrep. 273, 43 Pac. 611.

8. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603. See CONTRACTS, vol. 6, p. 247 et seq.

9. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

10. Kimball v. Semple, 25 Cal. 440.

11. Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896.

irrespective of manifest intention.[12] On the other hand, the real intention will not avail unless the language used is capable of a reasonable construction which will effectuate that intention.[13]

§ 118. What Law Governs—Questions of Law or Fact. A deed is to be construed according to the law in force at the time it was executed.[14] And the effect and construction to be given it must be determined by the laws of the state in which the land it conveys is located, irrespective of where the deed may have been executed or the grantor resides. This is in consonance with the generally recognized principle that the lex rei sitae governs the descent, alienation and transfer of real property.[15] The construction of a deed is a matter of law,[16] and it is the province of the court to construe its language, and from the language ascertain and determine the intention of the parties.[17]

§ 119. Rule of Intention.—The primary object of all interpretations of a conveyance is to ascertain and give effect to the intention of the parties[18] at the time of its

12. Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 473. See BOUNDARIES, vol. 4, p. 373.

13. City of Stockton v. Weber, 98 Cal. 433, 33 Pac. 332.

14. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

15. Platner v. Vincent, 187 Cal. 443, 202 Pac. 655. See CONFLICT OF LAWS, vol. 5, p. 463.

16. Sepulveda v. Sepulveda, 77 Cal. 605, 20 Pac. 145.

17. Moody v. Palmer, 50 Cal. 31; Mulford v. Le Franc, 26 Cal. 88.

18. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; City of Stockton v. Weber, 98 Cal. 433, 33 Pac. 332; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Mulford v. Le Franc, 26 Cal. 88; Wagenblast v. Washburn, 12 Cal. 208; Brannan v. Mesick, 10 Cal. 95; Mesick v. Sunderland, 6 Cal. 297; Farnham v. Huston, 39 Cal. App. 687, 179 Pac. 701; Hughes v. Scott, 32 Cal. App. Dec. 75, 190 Pac. 643; Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809; Braman v. Mesick, 1 Lab. 24; Peterson v. Machado, 5 Cal. Unrep. 273, 90 Pac. 948; Civ. Code, § 1636.

execution.[19] The intention, of course, must be lawful, and the construction must not be contrary to some positive rule of law.[20] And it is the tendency of modern decisions to give effect to that intention regardless of technical rules of construction.[1] In construing a doubtful contract the court will ascertain the relation of the parties to each other and to the subject matter of the contract, and, if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, if this can be done without disregarding the language of the instrument when all its parts are considered.[2]

§ 120. Ambiguous Language Generally.—The intention of the parties to a grant is to be gathered, if possible, from the instrument itself, and determined by a proper construction of the language used therein,[3] rather than by resorting to extrinsic evidence.[4] Where there is nothing ambiguous or uncertain in the terms of a deed, it speaks for itself,[5] and cannot be changed except by reformation of the deed in equity.[6] In such case the court should

19. Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Kimball v. Semple, 25 Cal. 440; Brannan v. Mesick, 10 Cal. 95. See CONTRACTS, vol. 6, p. 163.

20. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603 (applying Civ. Code, § 1636); Braman v. Mesick, 1 Lab. 24.

1. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047; Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896.

2. Thompson v. McKay, 41 Cal. 221; Wilson v. Truebody, 1 Cal. Unrep. 238. See infra, §§ 120–127, as to rules of construction of language.

3. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Sherriff v. Sherriff, 32 Cal. App. 681, 163 Pac. 878; East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634; Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935.

4. Pulliam v. Bennett, 55 Cal. 368.

5. Horton v. Winbigler, 175 Cal. 149, 165 Pac. 423 (holding that the attorney who prepared a deed could not testify as to what was intended by its terms); Conlin v. Southern Pac. R. R. Co., 40 Cal. App. 733, 182 Pac. 67 (applying Civ. Code, § 1638).

6. Taylor v. Avila, 175 Cal. 203, 165 Pac. 533.

limit its inquiry to what the words of the deed express, without regard to any intention independent of the words.[7] But when the intent of the parties is not apparent from the deed, it is to be sought by a resort to the established rules of construction.[8] A deed is presumed to express the intention of the grantor;[9] the court therefore should not presume an intention not indicated by the language used,[10] nor engraft a meaning where it is necessary to disregard some words and interpolate others.[11] Nor unless under the peculiar rules of equity to raise a trust, can its terms or legal effect be contradicted.[12] On the other hand, no matter how broad the language used, it will not be extended beyond the clear intent of the parties.[13] And if the language is that intended to be used by the grantor, his mistake as to its legal effect will not afford him equitable ground for relief.[14]

§ 121. Patent and Latent Ambiguities.—The distinction between patent and latent ambiguities, generally speaking, enables the court to distinguish between cases curable and those of incurable uncertainty.[15] It is an established principle that parol evidence cannot be admitted to add to, contradict or control the language of a deed.[16] Such

7. Donahue v. McNulty, 24 Cal. 411, 85 Am. Dec. 78; Barry v. Sutter, 26 Cal. App. 240, 146 Pac. 527.

8. Kimball v. Semple, 25 Cal. 440; see supra, § 117.

9. Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Drake v. Russian River I. Co., 10 Cal. App. 654, 103 Pac. 167.

10. Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573.

11. Hayes v. Wetherbee, 60 Cal. 396.

12. Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860.

13. MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248 (applying Civ. Code, § 1648).

14. Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Kopp v. Gunther, 95 Cal. 63, 30 Pac. 301.

15. Brannan v. Mesick, 10 Cal. 95. See CONTRACTS, vol. 6, p. 277.

16. Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794; County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Irving v. Cunningham, 66 Cal. 15, 4 Pac. 766; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331. See infra, §§ 234, 235, as to parol evidence; and see, generally, EVIDENCE.

evidence is admissible only where the deed itself is ambiguous and uncertain,[17] except where it is sought to reform or correct it to make it conform to the real intention of the parties.[18] Thus, where a map is made part of a deed by reference,[19] and the description in the deed fits two distinct parcels of land as shown on the map, there is a patent ambiguity which cannot be removed by resort to extraneous facts, and the deed is void for uncertainty.[20] A latent ambiguity, however, may be explained by parol evidence,[1] not to vary the instrument but to apply its language to the subject matter.[2]

§ 122. Scope of Inquiry.—Subject to the principles enunciated in the preceding paragraph, and applying the general rule for the interpretation of contracts,[3] if any doubt exists as to the intention of the grantor, in arriving at that intention it is the duty of the court to assume as nearly as possible the position of the contracting parties,[4] and consider the situation of the parties, the sub-

17. Riley v. North Star M. Co., 152 Cal. 549, 93 Pac. 194; Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573.

The rule is of value only as an aid in arriving at the intention of the parties as expressed in the instrument; Yuba Inv. Co. v. Yuba Consol. Gold Fields, 184 Cal. 469, 194 Pac. 19; Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794.

The parol testimony to remove the ambiguity should be so clear and convincing as to put beyond dispute or reasonable doubt the exact meaning and intention of the grantor. Crozer v. White, 9 Cal. App. 612, 100 Pac. 130.

18. Irving v. Cunningham, 66 Cal. 15, 4 Pac. 766.

19. See infra, §§ 160–163.

20. Cadwalader v. Nash, 73 Cal. 43, 14 Pac. 385; Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33.

1. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Irwin v. Towne, 42 Cal. 326; Crozer v. White, 9 Cal. App. 612, 100 Pac. 130; Spreckels v. Ord, 72 Cal. 86, 13 Pac. 158.

2. Stanley v. Green, 12 Cal. 148; Brennan v. Mesick, 10 Cal. 95.

3. Pulliam v. Bennett, 55 Cal. 368; Kimball v. Semple, 25 Cal. 440. See Civ. Code, § 1647; Code Civ. Proc., § 1860; and see CONTRACTS, vol. 6, p. 247 et seq.

4. Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. 130; Truett v. Adams, 66 Cal. 218, 5 Pac. 96; Pulliam v. Bennett, 55 Cal. 368; Walsh v. Hill, 38 Cal. 481; Kimball v. Semple, 25 Cal. 440.

ject matter at the time of the execution of the deed, and the circumstances leading to its execution, and interpret the words used in the light of those circumstances.[5] But facts subsequently developed, unknown to the parties at the time the conveyance was made, are not to be considered in construing a deed, for the reason that the parties could not have contracted with reference to them, and their intentions can in no respect be illustrated by them.[6]

§ 123. Common as Against Technical Meaning of Words.—In conformity with general principles of construction applicable to contracts,[7] words used in a conveyance are to be given their ordinary and popular meaning unless they are used in a technical or special sense, or the context shows that they are used in a different sense;[8] and technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.[9] But the courts look to the intent of the parties,

5. Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794; County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Stockton v. Weber, 98 Cal. 433, 33 Pac. 332; Watson v. Sutro, 86 Cal. 500, 25 Pac. 64; Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. 130; Grennan v. McGregor, 78 Cal. 258, 20 Pac. 559 (holding that courts take judicial notice of all English words); Truett v. Adams, 66 Cal. 218, 5 Pac. 96; Sprague v. Edwards, 48 Cal. 239; Altschul v. San Francisco, etc., Homestead Assn., 43 Cal. 171; Thompson v. McKay, 41 Cal. 221; Stanley v. Green, 12 Cal. 148 (approved in Joyce v. Tomasini, 168 Cal. 234, 142 Pac. 67, citing a long list of general authorities); Brannan v. Mesick, 10 Cal. 95; Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974; MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248; Crozer v. White, 9 Cal. App. 612, 100 Pac. 130; King v. Samuel, 7 Cal. App. 55, 93 Pac. 391; Code Civ. Proc., § 1860.

6. Piper v. True, 36 Cal. 606.

7. See CONTRACTS, vol. 6, pp. 256, 259.

8. Wood v. Mandrilla, 167 Cal. 607, 140 Pac. 279; MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248. See Civ. Code, § 1644.

9. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712 (applying Civ. Code,

rather than to the mere choice of words,[10] and whenever it is apparent that a grantor has used a technical word to express an idea different from its technical signification, a court will construe it according to that intention.[11] This principle has been applied to terms used in the description of property[12] or the interest conveyed,[13] and in determining whether a clause was intended to be a reservation or an exception,[14] or as to whether a condition should be deemed precedent or subsequent.[15] It is a further illustration of the principle, that a grantor has power to define the words used in a deed, and if the definition is free from ambiguity it cannot be attacked on the ground that it is repugnant to the words defined.[16] If the instrument thus contains a glossary of its own terms, or if a term used in one part of the instrument can be interpreted by its use in another part, courts will avail themselves of this means of ascertaining the meaning.[17]

§ 1645); Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547 (construing the word "heirs"); Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

10. Cohen v. Adolph Kutner Co., 177 Cal. 592, L. R. A. 1918D, 410, 171 Pac. 424; Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974.

11. Central Pac. R. R. Co. v. Beal, 47 Cal. 151.

12. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Currier v. Nelson, 96 Cal. 505, 31 Am. St. Rep. 239, 31 Pac. 531, 746; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Central Pac. R. R. Co. v. Beal, 47 Cal. 151; Irwin v. Towne, 42 Cal. 326; Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573.

13. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974.

14. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889; Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal. App. 451, 181 Pac. 98.

15. Bank of Suisun v. Stark, 106 Cal. 202, 39 Pac. 531.

16. Castro v. Tennent, 44 Cal. 253; Morrison v. Wilson, 30 Cal. 344 ("If they see fit to agree that mile shall stand for league, or grant, bargain and sell for quitclaim, or even black for white, however we might marvel at the caprice, we could not question the power").

17. Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547. Compare supra, § 11, as to power of grantor to define the character of his conveyance.

§ 124. Grammar and Punctuation—Written and Printed Words.—The grammatical construction of a deed is not always to be followed, but rather that construction which will accomplish the object for which it was executed,[18] however clumsily the instrument may be worded, and however grossly the strict rules of grammatical construction may be violated.[19] Punctuation will be changed or eliminated in order to give effect to the apparent intent,[20] and obvious clerical errors will be disregarded,[1] or will be corrected without the aid of extrinsic evidence,[2] and without the necessity of resorting to a court of equity.[3] Also emphasis is given to words where written in by the grantor, being evidently selected with a special view to effectuate the purpose of the grantor.[4]

§ 125. Relative Value of Clauses in General.—Inasmuch as the office of the habendum clause of a deed is to limit, enlarge and define the estate indicated in the granting clause,[5] the habendum will be given such qualifying effect, and will prevail over the granting clause or premises, so far as necessary to carry out the manifest intention of the grantor.[6] It is in such case to be considered as an adden-

18. Racouillat v. Sansevain, 32 Cal. 377; Hancock v. Watson, 18 Cal. 137.

19. Sprague v. Edwards, 48 Cal. 239.

20. Bresee v. Dunn, 178 Cal. 96, 172 Pac. 387; Anderson v. Palladine, 39 Cal. App. 256, 178 Pac. 553. See CONTRACTS, vol. 6, p. 276.

1. Hunt v. Barker, 27 Cal. App. 776, 151 Pac. 165; Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153.

2. Wagenblast v. Washburn, 12 Cal. 208.

3. Sprague v. Edwards, 48 Cal. 239.

4. Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896. See CONTRACTS, vol. 6, p. 283.

5. Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500; Montgomery v. Sturdivant, 41 Cal. 290; Hilborn v. Soale, 44 Cal. App. 115, 185 Pac. 982; Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896. See supra, § 3.

6. Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; Montgomery v. Sturdivant, 41 Cal. 290; Martin v. City of Stockton, 39 Cal. App. 552, 179 Pac. 894; East San Mateo Land Co. v. Southern Pac.

dum or proviso to the granting clause, which, by a well-settled rule of construction, must control that clause, even to the extent of destroying the effect of the same.[7] But where there is an irreconcilable conflict between the habendum and a preceding granting clause, the granting clause will prevail,[8] following the principle "if several parts of a grant are absolutely irreconcilable the former part prevails."[9] This rule does not apply, however, where it appears from the whole conveyance, or from the language of the subsequent clause, that the grantor intended thereby to qualify the granting clause,[10] or where the grantee will receive an estate of value even if the granting clause be modified as may be necessary to give effect to all the parts of the deed.[11] There is no repug-

R. R. Co., 30 Cal. App. 223, 157 Pac. 634; Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; King v. Samuel, 7 Cal. App. 55, 93 Pac. 391; Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896. And see cases cited infra, as to qualifying the estate granted.

7. Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896.

8. Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566; Wilcoxson v. Sprague, 51 Cal. 640; Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61; Havens v. Dale, 18 Cal. 359; Eldridge v. See Yup Co., 17 Cal. 44; Cooper v. Selig, 32 Cal. App. Dec. 604, 191 Pac. 983; Martin v. City of Stockton, 39 Cal. App. 552, 179 Pac. 894; Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935. This doctrine is applicable only where the clauses are irreconcilable. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097.

9. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935; Civ. Code, § 1070, and see infra, § 126.

10. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097 (stating the rule); Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; In re Vance, 100 Cal. 425, 34 Pac. 1087; Stockton v. Weber, 98 Cal. 433, 33 Pac. 332; Castro v. Tennant, 44 Cal. 253; Morrison v. Wilson, 30 Cal. 344; East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 23, 157 Pac. 634.

11. Pavokovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097.

nancy between the granting clause and limitations and restrictions thereinafter expressed where the granting clause itself declares it is subject to such limitations.[12] By such a declaration the limitation becomes as much a part of the granting clause as though set forth letter by letter therein.[13] The general rule is that all parts of a deed must be applied so as to give effect and meaning to every part, if possible, each clause being considered separately and being governed by the intent deducible from a fair consideration of the entire instrument.[14] And if a clause is repugnant to the general intent of a deed to convey some property or interest therein it is void.[15]

§ 126. Position of Clauses—Relative Clearness.—"If several parts of a grant are absolutely irreconcilable, the former part prevails."[16] The same principle phrased in a different way has been considered in a previous paragraph.[17] This code section must be read in connection with other provisions of the code governing the interpretation of contracts,[18] such as that the instrument must be interpreted most strongly against the party who caused the uncertainty to exist,[19] or recourse may be had to the recitals of a deed to assist in the construction of the grant,[20] or a grant is to interpreted in favor of the grantee.[1] Where the question is simply one of construction the code rule should be followed. But the general rule that the earlier clause prevails is not imperative

12. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Martin v. City of Stockton, 39 Cal. App. 552, 179 Pac. 894.

13. Martin v. City of Stockton, 39 Cal. App. 552, 179 Pac. 894.

14. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Hayes v. Wetherbee, 60 Cal. 396; Civ. Code, § 1641.

15. Wilcoxson v. Sprague, 51 Cal. 640. See infra, § 140, for a general application of the above principles.

16. Civ. Code, § 1070; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491. And see cases cited infra, this section.

17. See supra, § 125.

18. Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896. See CONTRACTS, vol. 6, p. 247 et seq.

19. King v. Samuel, 7 Cal. App. 55, 93 Pac. 391; Civ. Code, § 1654.

20. Civ. Code, § 1068.

1. MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

where the inconsistency or irreconcilability is so great as to justify extrinsic evidence to explain it.[2] And the rule has no application in a case where the limitation or qualification of the grant constitutes a part of the granting clause itself, which constitutes but one part.[3] Nor is there any repugnancy within the rule between a conveyance of a fee and a reservation of an easement affecting the land conveyed.[4]

Relative clearness of clauses.—"A clear and distinct limitation in a grant is not controlled by other words less clear and distinct,"[5] or, as the statement implies, such limitation can only be reduced or qualified by language equally plain.[6] Thus, where an asserted modifying or limiting clause was of doubtful import, the fee contemplated by the granting clause was not cut down.[7] And where a life estate was limited in the habendum by clear and distinct words, it could not be controlled by less clear and distinct words elsewhere.[8]

§ 127. Recitals as Modifying Words of Conveyance.—It is an established canon of construction that the general words in a deed may be restrained by the particularity of its recitals.[9] As the code states the rule: "If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction."[10] But the rule is applicable only in case of uncertainty. Recitals may be operative in the sense that they may bind either or both parties to the truth of the facts stated,[11] or re-

2. King v. Samuel, 7 Cal. App. 55, 93 Pac. 391.

3. Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465.

4. Weller v. Brown, 160 Cal. 515, 117 Pac. 517.

5. Civ. Code, § 1067; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

6. Shaw v. Caldwell, 16 Cal. App. 1, 115 Pac. 941.

7. Cooper v. Selig, 32 Cal. App. Dec. 604, 191 Pac. 983.

8. Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896.

9. Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

10. Civ. Code, § 1068; Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500.

11. See supra, § 96.

citals may be examined for the purpose of resolving an ambiguity in the operative words of the grant itself. But where the words of the grant are clear the recitals cannot be resorted to for the purpose of imparting an ambiguity to the entire instrument by which clear words of grant may be limited in their effect.[12]

§ 128. Deed Considered as a Whole.—The modern doctrine of construction of deeds is that the intention of the grantor is to be gathered from a consideration of the entire instrument,[13] though the immediate object of inquiry is the meaning of an isolated clause,[14] taking into consideration every provision, clause and word, whether words of grant, or description, or words of qualification, restraint, exception or explanation.[15] As in the construction of a deed, every part is to be given effect if reasonably practicable, and if consistent with its evident purpose and operation,[16] each clause helping to interpret the

12. MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

13. Bresee v. Dunn, 178 Cal. 96, 172 Pac. 387; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Pico v. Coleman, 47 Cal. 65; Thompson v. McKay, 41 Cal. 221; Mesick v. Sunderland, 6 Cal. 297; Roberts v. Abbott, 32 Cal. App. Dec. 1026, 192 Pac. 345; Sherriff v. Sherriff, 32 Cal. App. 681, 163 Pac. 878; Whitcomb v. Worthing, 30 Cal. App. 629, 159 Pac. 613; Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935; Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896; King v. Samuel, 7 Cal. App. 55, 93 Pac. 391. And see cases infra, this section.

14. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271; Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Stockton v. Weber, 98 Cal. 433, 33 Pac. 332; Brannan v. Mesick, 10 Cal. 95.

15. East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634.

16. Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; Hayes v. Wetherbee, 60 Cal. 396; Havens v. Dale, 18 Cal. 359; Brannan v. Mesick, 10 Cal. 95; Hughes v. Scott, 32 Cal. App. Dec. 75, 190 Pac. 643; MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248. See Civ. Code, § 1641.

others,[17] in order to collect from the whole, one uniform and consistent sense, if that may be done.[18] As frequently stated, the court must place itself as near as possible in the place occupied by the parties when the deed was executed, and, taking it by its four corners, read it, and if possible give effect to every word in it.[19] In short, intention may be expressed anywhere in the instrument, and by any words,[20] the inclination of courts at the present day being to regard the whole instrument without reference to formal divisions.[1] These rules of construction, however, are not to be deemed antagonistic to the principle that where from the whole instrument the intent is clear to convey an unqualified fee, an attempt to put restraints on its alienation will be held void.[2]

§ 129. Construed With Other Instruments.—It is a rule of contracts[2a] applicable to deeds that several instruments relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be construed together.[3] Accordingly, where a deed of

17. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Brannan v. Mesick, 10 Cal. 95; East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac 634; Peterson v. Machado, 5 Cal. Unrep. 273, 43 Pac. 611; Civ. Code, § 7641.

18. Brannan v. Mesick, 10 Cal. 95.

19. Walsh v. Hill, 38 Cal. 481 (termed the only rule of much value); Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974; MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248 (declared to be the first fundamental rule of construction); Anderson v. Palladine, 39 Cal. App. 256, 178 Pac. 553; East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634.

20. East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634.

1. Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935. For the application of these rules to the construction of contracts generally, see CONTRACTS, vol. 6, p. 258.

2. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

2a. See CONTRACTS, vol. 6, p. 298.

3. Civ. Code, § 1642; Suhr v. Lauterbach, 164 Cal. 591, 130 Pac. 2; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637; Estate of Porter, 138 Cal. 618, 72 Pac.

property upon which there was an outstanding lease carried an implied covenant against encumbrances, and the grantee as a part of the transaction required and obtained an assignment of the lease, the deed and assignment were construed as one instrument, and the deed was held subject to the lease.[4] This rule is particularly applicable where another instrument has been linked to a deed by special mention.[5] Thus, a deed conveying a life estate to the wife of the grantor and providing that upon her death title should pass to certain children named, and referring to "their separate deeds to each," executed by the husband and wife, was held to vest the remainder in the children, though their individual deeds were never delivered.[6] But it is not necessary to entitle several instruments to be construed together that they should be executed at the same time. Hence, a declaration of trust,[7] a defeasance,[8] and an agreement to reconvey,[9] executed after the signing and delivery of a deed, have been construed with the deed, when executed in accordance with an understanding had when the deed was given. And parol evidence is admissible in such cases to show the real nature of the transaction.[10] So a separate deed executed and delivered as part of a transaction looking to the partition of property, and being an integral part of and therefore dependent upon the partition agreement, was held void where such

173; Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385; James v. Throckmorton, 57 Cal. 368; Pulliam v. Bennett, 55 Cal. 368; Patterson v. Donner, 48 Cal. 369; Galland v. Jackman, 26 Cal. 80, 85 Am. Dec. 172. And see cases cited infra. As to effect given to several deeds executed at the same time to different parties, see infra, § 86.

4. Mann v. Montgomery, 6 Cal. App. 646, 92 Pac. 875.

5. Sutter Butte C. Co. v. Richvale L. Co., 40 Cal. App. 451, 181 Pac. 98; Drake v. Russian River L. Co., 10 Cal. App. 654, 103 Pac. 167; Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896. See, also, §§ 160–163, infra.

6. Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896.

7. Younger v. Moore, 155 Cal. 767, 103 Pac. 221.

8. Sears v. Dixon, 33 Cal. 326.

9. Adams v. Lambard, 80 Cal. 426, 22 Pac. 180.

10. Adams v. Lambard, 80 Cal. 426, 22 Pac. 180; Sears v. Dixon, 33 Cal. 326.

agreement never became effective.[11] Indorsements made upon a deed may also be construed with it under proper circumstances in determining its effect;[12] as, for instance, where a deed was executed under a power of attorney, as the agent's own deed without reference to the power, and an indorsement was subsequently made explaining the true relation of the parties.[13]

Merger of prior agreements.—A deed executed in consummation of an agreement merges all prior negotiations and agreements relating thereto, and in the absence of fraud or mistake the deed must be the sole guide for measuring and determining the rights of the parties.[14] Hence, where a deed is certain and unambiguous, it must prevail over an inconsistent contract in pursuance of which it was given.[15] It has been held that a deed is not void under the statute of frauds though executed in performance of a prior written agreement.[16]

§ 130. Tendency to Uphold—Deeds—Practical Construction.—The tendencies of modern decisions is to uphold conveyances, regardless of technical rules of construction.[17] Hence, it is presumed that a grantor intended by

11. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

12. Gerdes v. Moody, 41 Cal. 335; Ingoldsby v. Juan, 12 Cal. 564.

13. Gerdes v. Moody, 41 Cal. 335.

14. Civ. Code, § 1625; Code Civ. Proc., § 1856; Werner v. Graham, 181 Cal. 174, 183 Pac. 945; Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456; Bryan v. Swain, 56 Cal. 616; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Peabody v. Phelps, 9 Cal. 213 (applying the rule even in cases of fraudulent misrepresentations; but, see, Wright v. Carillo, 22 Cal. 595. See, generally, VENDOR AND PURCHASER); Gaffey v. Welk, 31 Cal. App. Dec. 643, 189 Pac. 300; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185; Goldstein v. Hensley, 4 Cal. App. 444, 88 Pac. 991. As to the rule governing the admissibility of evidence of the terms of the agreement other than the contents of the writing, see Code Civ. Proc., § 1856.

15. Riley v. North Star M. Co., 152 Cal. 549, 93 Pac. 194; Hochstein v. Berghauser (applying Civ. Code, § 1698, providing that a written contract may be altered by a contract in writing); Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185.

16. Ryan v. Tomlinson, 39 Cal. 639. See FRAUDS, STATUTE OF.

17. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047;

his deed to make a valid grant of some property unless the contrary appears,[18] applying the legal maxim that it is better to give effect than to destroy.[19] The intention of the parties must be lawful, and the construction must not be contrary to some positive rule of law.[20]

A deed which is ambiguous or uncertain, like any other contract indefinite in terms,[1] may be made definite and certain by the acts and practical construction of the parties to it[2] while in interest.[3] Such evidence is often very material[4] and affords the surest and most certain test of the understanding of the parties.[5] But the rule applies only where the language on the face of the instrument is doubtful, uncertain or ambiguous.[6]

§ 131. Favor as Between Grantor and Grantee.—The code provides that

"A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by

Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Wilcoxson v. Sprague, 51 Cal. 640.

18. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222.

19. Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Ornbaum v. His Creditors, 61 Cal. 455.

20. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Civ. Code, §§ 1636, 1643.

1. See CONTRACTS, vol. 6, p. 305.

2. Grant v. Bannister, 160 Cal. 780, 118 Pac. 253; Mulford v. Le Franc, 26 Cal. 88; Brannan v. Mesick, 10 Cal. 95; Shaw v. Caldwell, 16 Cal. App. 1, 115 Pac. 941; Brethauer v. Foley, 15 Cal. App. 19, 113 Pac. 356; Estate of Goetz, 13 Cal. App. 198, 109 Pac. 145; Smith v. Williams, 6 Cal. Unrep. 193, 55 Pac. 600. See cases cited under § 167, infra.

3. Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

4. Vejar v. Mound City L. etc. Assn., 97 Cal. 659, 32 Pac. 713.

5. Grant v. Bannister, 160 Cal. 774, 118 Pac. 253; Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107; Pico v. Coleman, 47 Cal. 65; Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114.

6. Wood v. Mandrilla, 167 Cal. 607, 140 Pac. 279; Truett v. Adams, 66 Cal. 218, 5 Pac. 96; Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114.

a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.'"[7]

The rule presupposes the existence of an effective grant, and relates only to the extent of its operation.[8] It does not, however, apply to private grants where the uncertainty was caused by the grantee.[9] In such case it must be read in connection with another code rule that where there is uncertainty the language of the instrument must be interpreted most strongly against the party who caused the uncertainty to exist,[10] and in case of public grants to private persons it is presumably the grantee who caused the uncertainty.[11] The rule first stated is a specific application of the more general rule that that construction is to be taken, "which is most favorable to the party in whose favor the provision is made."[12] That part of the principal rule having reference to public officers refers to grants of public property by public officers or public bodies to

7. Civ. Code, § 1069. See, as to grants, generally, under this rule: Younger v. Moore, 155 Cal. 767, 103 Pac. 221; Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; Sprague v. Edwards, 48 Cal. 239; Salmon v. Wilson, 41 Cal. 595; Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61; Sullivan v. Davis, 4 Cal. 291; Cooper v. Selig, 32 Cal. App. Dec. 604, 191 Pac. 983; McFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248; Seligman v. Carr, 8 Cal. App. 572, 97 Pac. 324.

For application of rule to uncertainties in description, see infra, § 155 et seq. And see infra, § 190, as to reservations.

8. Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222.

9. As to public grants or grants by public officers under the rule, see: Freelon v. Adrian, 161 Cal. 13, 118 Pac. 220; Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38, 41 Pac. 330; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222. See PUBLIC LANDS.

10. Civ. Code, § 1654; Union Oil Co. v. Stewart, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313; Payne v. Neuval, 155 Cal. 46, 99 Pac. 476; King v. Samuel, 7 Cal. App. 55, 93 Pac. 391.

11. Civ. Code, § 1654; Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222. See PUBLIC LANDS.

12. Code Civ. Proc., § 1864; Seligman v. Carr, 8 Cal. App. 572, 97 Pac. 324; and compare infra, § 190.

private persons. It does not apply for instance to conveyances by a sheriff made in his official capacity.[13]

VIII. ESTATE CONVEYED.

In General.

§ 132. Rule Stated.—The constitutional right to acquire, possess and dispose of property includes the right to divide it into estates and dispose of it for successive periods or otherwise.[14] It is proper to mention in this connection that an interest in land may be created by deed which can hardly be classified as an estate, being neither a grant of land nor lease properly so called, but an interest in the nature of an incorporeal hereditament usufructuary in its nature and character; as where one grants the right to mine, quarry and take minerals from land.[15] A profit a prendre is capable of being transferred in gross, and at common law was regarded as an estate or interest in the land itself;[16] and it may also be transferred as appurtenant to land.[17] A deed may convey inchoate interests, as, for instance, an interest in public lands before the issuance of the government patent;[18] or a contract right of purchase in land—in the latter case the deed being in effect, an assignment of the contract right.[19] Similarly, the conveyance of a purchaser's interest in land purchased at

13. Freelon v. Adrian, 161 Cal. 13, 118 Pac. 220.

14. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242. For a full discussion of such right in its various aspects, see ESTATES; COTENANCY; LIFE ESTATES; REMAINDERS; REVERSIONS; etc.

15. Payne v. Neuval, 155 Cal. 46, 99 Pac. 476; Smith v. Cooley, 65 Cal. 46, 2 Pac. 880.

16. Painter v. Pasadena L. & W. Co., 91 Cal. 74, 27 Pac. 539. ("Attempts to create symmetry in the law by classification and designation of classes of different kinds of rights connected with and springing out of lands are always hazardous.")

17. See infra, § 153.

18. See infra, §§ 145, 146. See PUBLIC LANDS.

19. Peiser v. Bradbury, 138 Cal. 570, 72 Pac. 165; Heinlen v. Martin, 53 Cal. 321; Burton v. Le Roy, 5 Sawy. 510, Fed. Cas. 2217.

execution sale before the time for redemption expires operates as an assignment of the sheriff's certificate of sale.[20] But a deed does not carry merely incidental rights, such as a widow's right to have a probate homestead administered to her from her husband's estate,[1] or right to an allowance from the estate;[2] nor operate to transfer to the grantee a cause of action for deceit arising out of the sale of the property to the grantor.[3] A leasehold for a term exceeding one year may be conveyed by deed absolute, and is deemed a conveyance of real estate.[4] A deed from husband to wife of "an undivided or community interest" in his separate property conveys only a community interest, and not a fee interest to the extent of one-half of the property.[5]

§ 133. Words of Inheritance.—Section 1072 of the Civil Code declares the rule that "Words of inheritance or succession are not requisite to transfer a fee in real property." Hence, the word "heirs" in the granting clause of a deed adds nothing to the effect of the deed, if the estate conveyed is not otherwise limited;[6] and creates no repugnance to other parts of the deed which plainly restrict the interest conveyed to less than a fee.[7] At common law it was necessary to use the word "heirs" or other words of inheritance in order to convey a fee,—[8] otherwise only a

20. Leonard v. Flynn, 89 Cal. 535, 23 Am. St. Rep. 500, 26 Pac. 1097; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; Green v. Clark, 31 Cal. 591.

1. In re Vance, 100 Cal. 425, 34 Pac. 1087.

2. De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637.

3. Lawrence v. Montgomery, 37 Cal. 183.

4. Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130 (construing Civ. Code, § 1215).

5. Sherriff v. Sherriff, 32 Cal. App. 681, 163 Pac. 878. See COMMUNITY PROPERTY, vol. 5, p. 349, as to conveyance from the husband to the wife.

6. Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896.

7. Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049.

8. Painter v. Pasadena L. & W. Co., 91 Cal. 74, 27 Pac. 539; Montgomery v. Sturdivant, 41 Cal. 290; Bodley v. Ferguson, 20 Cal. 511 (implied, but holding that the com-

life estate was created.[9] The rule was of feudal origin, and the original and underlying reason for it, was that the personal services of the grantee were the only consideration of the grant, and that the estate therefore could not continue beyond the life of the grantee, unless the grantor expressly provided that it should extend to his heirs.[10] The above provision, with sections 1092 and 1105 of the Civil Code, were intended to change the common-law rule, both in respect to a transfer of the fee and of all other estates in real property.[11] A statutory provision similar to section 1072 of the Civil Code existed prior to the code.[12]

§ 134. Words of Limitation or of Purchase.—The word "heirs," when used according to its strict legal import,[13] designates the person who would by law succeed to the real estate in case of intestacy.[14] It is primarily not a word of purchase carrying title directly to the heirs, but is a word of limitation, limiting and defining what estate passes to the grantee.[15] And it will be taken as a word of limitation in the absence of anything to indicate that it was used in a contrary sense.[16] The word "purchase," on the other hand, includes every mode of acquiring an estate except by inheritance.[17] As to whether such words as "children," "issue" and the like have been used as the equivalent of "heirs," that is, whether they have been used

mon-law rule was not applicable to a mere contract to convey).

9. Montgomery v. Sturdivant, 41 Cal. 290.

10. Painter v. Pasadena L. & W. Co., 91 Cal. 74, 27 Pac. 539.

11. Painter v. Pasadena L. & W. Co., 91 Cal. 74, 27 Pac. 539. See supra, § 3, and infra, § 137.

12. Laws of 1855, § 2, p. 171; Montgomery v. Sturdivant, 41 Cal. 290.

13. See supra, § 133.

14. Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547. See Civ. Code, § 1384.

15. Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543. Compare Civ. Code, § 1335, declaring what words in a will are words of "donation" and not of "limitation."

16. See supra, § 123.

17. Greer v. Blanchar, 40 Cal. 194.

as words of purchase or of limitation,[18] it has been laid down as the broad rule "that 'heirs' will be construed as meaning children, and vice versa, and 'children' as issue, grandchildren, or descendants, whenever justice or reason of the case requires it."[19] The word "heirs" may sometimes mean the same as child or children, which are words of purchase. The word "issue" in a deed, is always taken as a word of purchase, and when so used is synonymous and coextensive with the term descendants, and includes all persons who answer that description.[20]

§ 135. Rule in Shelley's Case.—The so-called rule in Shelley's case governs the construction of all deeds of conveyance in California made prior to January 1, 1873, when that rule was abolished by the code.[1] This rule is that where a will devises or a deed grants land to one for life, and the remainder after his death to his heirs, or to the heirs of his body, using these words or other words having the same legal effect, the effect is to vest in the immediate grantee a fee simple absolute, if the remainder is to his "heirs," or a qualified fee, if it is to the "heirs of his body."[2] Such words are held as a limitation, in other words, as a definition, of the estate which the grantee

18. Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Brenham v. Davidson, 51 Cal. 352; Montgomery v. Sturdivant, 41 Cal. 290.

19. See 8 Ruling Case Law, p. 1056.

20. Montgomery v. Sturdivant, 41 Cal. 290. For a more extended discussion, see infra, §§ 135, 136; and see WILLS.

1. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306; Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. Civ. Code, § 779, reads as follows: "When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life."

2. Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18.

or devisee takes.[3] The "heirs" in such cases take no estate or interest in the land during the life of the ancestor and the latter may dispose of it as if the deed or will contained no words purporting to transfer to him less than a fee. The fundamental reason for the rule is that at common law the words "and to his heirs" or "and to the heirs of his body," necessarily implied that the heirs mentioned should take by inheritance from the life tenant, and not directly by the deed, or directly from the grantor; and, as this could not be so unless the life tenant had an estate of inheritance to pass at his death, it followed as a necessary consequence that the deed must be understood to vest the fee in him as well as the life estate. In such cases the word "heirs" is used in the broad sense, to signify the persons who take the estate by succession from generation to generation, forever, or as it is sometimes expressed, the whole inheritable blood of the life tenant, so that such life tenant, and not those who may be his heirs at his death, is the original stock of inheritance. As it is usually stated, the words "heirs" or "heirs of his body," or whatever other words of like effect are used, are words of limitation and not of purchase. The rule is one of positive law, and defeats even a declared contrary intent if, notwithstanding such declaration, it appears that the word "heirs" was used in this technical sense; and the primary question is always whether or not it was so used.[4]

§ 136. Application of Rule and Effect of Abolition.— It is because the rule does violence to the deed of the grantor or the will of the testator, to the end that the laws of inheritance should prevail over the wish of the grantor or testator, that it has always been subjected to rigidly strict construction;[5] and if, from a reasonable interpretation of the grant, it appears that the word "heirs" was

3. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306.

4. Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18, per Shaw, J. See, also, WILLS.

5. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306.

not used in this technical sense, the implication as to the meaning of the phrases, upon which the rule is founded, will not govern.[6] Thus, in a grant to a person for his life, and after his death "then to descend to the children or other lawful heirs of his body, who may survive him," the words "children" and "who may survive him" were held to qualify the phrase "lawful heirs of his body" and to take the grant out of the rule, as showing that the class designated by the term "heirs" was intended to take directly by the deed as purchasers and not by inheritance from the grantee.[7] The same was held where the grant of the remainder following a life estate was to the issue and heirs of the bodies of the grantees "and the heirs of such issue forever," the quoted phrase showing an intention that the heirs of the grantees should not take by descent, but should take as purchasers and so constitute a new stock of inheritance.[8] The rule as applied to deeds has been generally held of more absolute control than when applied to wills.[9] By the code provision abolishing the rule the term "heirs" as used in a limitation over, following a life estate, is changed from a word of limitation to one of purchase, and becomes a specific designation of

6. Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18; Montgomery v. Sturdivant, 41 Cal. 290.

7. Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18 (Beatty, C. J., dissenting on the ground that the case was not distinguishable from Norris v. Hensley, 27 Cal. 439. The court cites cases from other jurisdictions in which various expressions were held sufficient to take the case out of the rule, as follows: "And at her death to be equally divided among her children or legal heirs"; "To the children and lawful heirs"; "Shall be inherited by the surviving issue of my said niece, share and share alike"; "And at her death to the issue of her body then living"; "Heirs at law and next of kin"; "To the heirs of his body begotten if there be any such heirs him surviving"; "Heirs of his body living at the time of his death"; "To the heirs of her body begotten").

8. Montgomery v. Sturdivant, 41 Cal. 290. (Compare Brenham v. Davidson, 51 Cal. 352, in which the grant was by husband to wife and his son, and "after her decease to the children of the marriage, their heirs and assigns forever," but which was held to vest the fee in the two grantees as tenants in common.)

9. Norris v. Hensley, 27 Cal. 439.

a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the grantee, but by virtue of the remainder which was created for them at the execution of the deed to him.[10] The effect of the code provision is to restore to courts of equity their right to construe this language, in whatever instrument it may be found, in accordance with its plain import and intent.[11]

§ 137. Statutory Rules as to Fee or Lesser Estate.— The Civil Code provides that

"A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."[12]

Under this rule a grant, bargain and sale deed operates to pass the title in fee unless it contains in itself some limitation, exception or reservation.[13] The "lesser estate" referred to "must be a life estate or a leasehold estate for years."[14] Other provisions of the same code provide as follows:

"A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has, un-

10. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306; Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18; Barnett v. Barnett, 104 Cal. 298; 37 Pac. 1049; Hall v. Wright, 17 Cal. App. 502, 120 Pac. 429; County of Los Angeles v. Winans, 13 Cal. App. 234, 109 Pac. 640.

11. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306. See, also, WILLS.

12. Civ. Code, § 1105; Winchester v. Winchester, 175 Cal. 391, 165 Pac. 965; Taylor v. Avila, 175 Cal. 203, 165 Pac. 533; San Pedro etc. R. R. Co. v. Hamilton, 161 Cal. 610, 37 L. R. A. (N. S.) 686, 119 Pac. 1073; MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Pellissier v. Crocker, 103 Cal. 516, 37 Pac. 465; Logan v. Rose, 88 Cal. 263, 26 Pac. 106; Klumpke v. Baker, 68 Cal. 559, 10 Pac. 197; Mabury v. Ruiz, 58 Cal. 11; People v. Lawley, 17 Cal. App. 331, 119 Pac. 1089; Peterson v. Machado, 5 Cal. Unrep. 273, 43 Pac. 611.

13. Taylor v. Avila, 175 Cal. 203, 165 Pac. 533.

14. San Pedro etc. R. R. Co. v. Hamilton, 161 Cal. 610, 37 L. R. A. (N. S.) 686, 119 Pac. 1073 (dictum).

less a different intention is expressed or is necessarily implied."[15]

"A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer."[16]

The latter provision is in harmony with the doctrine generally prevailing that the ancient rules of forfeiture for such attempted alienation no longer obtain.[17] A rule substantially the same as section 1083 of the Civil Code existed prior to the enactment of the code, and provided that every conveyance should "pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms or be necessarily implied in the terms of the grant."[18] As the latter rule was construed, the word "grant" did not refer to the granting clause alone, but was synonymous with the word "conveyance" in the preceding clause of the act, and the intent was to be gathered from the entire instrument by which the grant was effected.[19]

§ 138. Rules Generally Applied.—A quitclaim deed passes whatever title,[20] and only such title,[1] as the grantor

15. Civ. Code, § 1083; Bond v. Aickley, 168 Cal. 161, 141 Pac. 1188; Payne v. Neuval, 155 Cal. 46, 99 Pac. 476; Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962; Callahan v. James, 7 Cal. Unrep. 82, 71 Pac. 104 (this applies to a legal title held in trust as well as any other).

16. Civ. Code, § 1108; San Pedro L. A. & S. L. R. Co. v. Hamilton, 161 Cal. 616, 37 L. R. A. (N. S.) 686, 119 Pac. 1073.

17. 8 R. C. L. 1035.

18. Laws 1855, § 2, p. 71.

19. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Montgomery v. Sturdivant, 41 Cal. 290.

20. Bond v. Aickley, 168 Cal. 161, 141 Pac. 1188; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac 1112; Taylor v. Opperman, 79 Cal. 468, 21 Pac. 869; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867; Frey v. Clifford, 44 Cal. 335; Graff v. Middleton, 43 Cal. 341; Lawrence v. Ballou, 37 Cal. 518; Carpentier v. Williamson, 25 Cal. 154; Downer v. Smith, 24 Cal. 114; City etc. of San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Sullivan v. Davis, 4 Cal. 291; Willson v. Truebody, 1 Cal. Unrep. 238.

1. Emeric v. Alvarado, 90 Cal.

had at the time of its execution. Similarly, a grant of "all the right, title and interest" of the grantor is uniformly held to vest in the grantee only what the grantor could claim,[2] and subject to all defects and equities which could then have been asserted against the grantor.[3] This construction is in accord with the obvious meaning of the language used.[4] It has been said that words such as "all . . . claim and demand whatsoever, as well in law as in equity," descriptive of the interest conveyed, are of more significance than the words of a quitclaim deed in the usual form.[5] And a declared intention "to grant all of that real property," etc., followed by the description, cannot be construed otherwise than as an expression of an intent to grant the fee, or the entire estate in whatever is described.[6] A deed purporting to convey land to which the grantor in fact has no title conveys nothing;[7] as where

444, 27 Pac. 356; Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309; Rosenthal v. Silveria, 42 Cal. App. 637, 184 Pac. 58; Gibbons v. Yosemite Lbr. Co., 34 Cal. App. Dec. 948 (Apl. 7, 1921); House v. Ponce, 13 Cal. App. 279, 109 Pac. 161; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

2. O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323 (holding such conveyance without covenants is a mere deed of quitclaim); Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309 (the court pointing out that an exception to the rule is found in the recording act giving priority to such a deed over a prior unrecorded deed. See supra, § 91; and see RECORDS; VENDOR AND PURCHASER; Kimball v. Semple, 25 Cal. 440; Gee v. Moore, 14 Cal. 472; Southern Pac. Co. v. Dore, 34 Cal. App. 521, 168 Pac. 147; National Bank of Bakersfield v. Williams, 31 Cal. App. 705, 161 Pac. 504.

3. Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309; Southern Pac. Co. v. Dore, 34 Cal. App. 521, 168 Pac. 147. See supra, § 91.

As to interest conveyed by execution deeds, see EXECUTIONS; and by estate deeds, see Code Civ. Proc., § 1555, and EXECUTORS AND ADMINISTRATORS.

4. Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309; Southern Pac. Co. v. Dore, 34 Cal. App. 521, 168 Pac. 147.

5. Stanway v. Rubio, 51 Cal. 41 (dictum).

6. Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816.

7. Warden v. South Pasadena etc. Co., 178 Cal. 440, 174 Pac. 26; Treat v. Treat, 170 Cal. 229, 150 Pac. 53, 57; Danglarde v. Elias, 80 Cal. 65, 22 Pac. 69.

a deed describes land in excess of that to which the grantor has title,[8] or where the grantor has conveyed all his interest by a prior deed,[9] or had only a bare right of possession without claim or color of title.[10] The presumption of an intention to pass the fee by a grant of real property has been indulged in the construction of agreements to execute a deed for property sold.[11]

§ 139. Particular Interests in Divided or Joint Estates. In consonance with the rules previously laid down,[12] a deed which purports to convey the entire fee in land in which the grantor owns only an undivided fractional interest,[13] or to convey a larger fractional interest than he owns,[14] is not void but passes whatever interest the grantor has, and does not impair the rights of his cotenants.[15] Thus, where one conveyed an undivided one-half interest in a lot to one person, then conveyed the west half of the lot to another, the second conveyance did not affect the grantor's interest in the east half, or the grantee's interest in the west half.[16] Such a conveyance

8. Warden v. South Pasadena etc. Co., 178 Cal. 440, 174 Pac. 26.

9. See supra, § 88.

10. Daubenbiss v. White, 3 Cal. Unrep. 590, 31 Pac. 360 (stating that such right cannot be transferred otherwise than by yielding up or abandoning the possession and permitting a new possession to be taken by another). Conveyance of expectancies or possibilities in estates, see infra, §§ 147, 148.

11. Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Burlingame v. Rowland, 77 Cal. 315, 1 L. R. A. 829, 19 Pac. 526. As to effect of deed conveying interest under contract of purchase, see supra, § 132. See, generally, VENDOR AND PURCHASER.

12. See supra, § 138.

13. Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139; Reed v. Spicer, 27 Cal. 57; Stark v. Barrett, 15 Cal. 361; Gaffey v. Welk, 31 Cal. App. Dec. 643, 189 Pac. 300.

14. Jordon v. Fay, 98 Cal. 264, 33 Pac. 95; Hager v. Spect, 52 Cal. 579.

15. Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Stark v. Barrett, 15 Cal. 361.

16. Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73,

of course is subject to the ultimate determination of the respective rights of the co-owners, and hence, to the contingency of loss of the particular parcel by partition.[17] The court will not ignore the grantor's intent to quitclaim his interest in the whole tract, though the words of the grant call for an undivided part.[18] A deed executed by two grantors, conveying an undivided fractional part of their right, title and interest, is properly construed as conveying their several as well as their joint interests.[19] A conveyance of a fractional interest in land under an executory contract of purchase operates merely as an assignment of a proportionate interest in the contract.[20]

Individual and representative capacities.—A deed is deemed to pass the grantor's entire individual interest in property of an estate, though he is described by his official title as executor, trustee, etc., where such designation is merely descriptive and not a limitation upon the estate conveyed,[1] or is repugnant to an otherwise individual deed,[2] or the grantor is without authority to convey estate interests.[3]

§ 140. Conflicting Clauses in General.—The effect of a conflict of clauses as bearing upon the estate conveyed, is a matter largely of the application of general rules already

36 Pac. 18 (holding the second conveyance did not constitute a parol partition where the first grantee did not acquiesce or consent).

17. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Stark v. Barrett, 15 Cal. 361. See COTENANCY; PARTITION; and on the question of estoppel, see supra, § 97.

18. Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715.

19. Castro v. Tennent, 44 Cal. 253.

20. Brock v. Pearson, 87 Cal. 581, 25 Pac. 963 (holding the assignee's right might be extinguished by destroying the instrument with intent to extinguish the right).

1. Norris v. Harris, 15 Cal. 226 (case of a deed of personal property).

2. Warden v. South Pasadena etc. Co., 178 Cal. 440, 174 Pac. 26; Estate of Conroy, 6 Cal. App. 741, 93 Pac. 205.

3. Morrison v. Bowman, 29 Cal. 337.

considered.[4] The estate or interest defined in the granting clause of a deed is not qualified by descriptive words following, but inconsistent therewith, which are in the nature of a reiteration, such as "being a one-half undivided interest,"[5] or "being a leasehold unexpired,"[6] or being only that interest "acquired by conveyance" from a certain person,[7] or "being the same tract of land conveyed" by one designated person to another.[8] And general words following the grant of an undivided fractional interest in land, such as "together with all the estate, right, title," etc., of the grantor, do not operate to extend the grant beyond the fractional interest named;[9] though where it appeared that the grantor intended, by general words following the grant of an undivided interest, to quitclaim his interest in the entire tract, effect was given to such intention.[10] And where words of conveyance in a granting clause described a specific one-third undivided interest which had been extinguished, it was held that they were ineffective as against words following which described a general one-third interest.[11] But subsequent explanatory words designed to make the estate or interest conveyed more definite and certain, such as "being the same acquired by the parties of the first part as heirs," etc.,[12] or "to wit, an undivided or community interest,"[13] are held to limit or restrict the prior words of conveyance. Likewise a bar-

4. See supra, §§ 125, 126.

5. McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566.

6. Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61.

7. Wilcoxson v. Sprague, 51 Cal. 640.

8. Hager v. Spect, 52 Cal. 579.

9. Hayes v. Wetherbee, 60 Cal. 396 (arguendo, quoting from Jackson v. Stevens, 16 Johns. 109).

10. Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715

11. Hartman v. Reed, 50 Cal. 485 (one justice dissenting on the ground that the obvious intention of the parties was to transfer a specific one-third which had been previously conveyed to a third person, and subject to the claims of such third person).

12. Castro v. Tennent, 44 Cal. 253.

13. Sherriff v. Sherriff, 32 Cal. App. 681, 163 Pac. 878.

gain and sale deed has been given the effect of a quitclaim deed by a clause following the habendum expressive of that intent.[14] And a clause in the habendum to the effect that the conveyance was intended to reconvey and release only such title as the grantor had obtained by deed from the grantee show an intention to qualify the interest granted and to place the parties in statu quo.[15] So a conveyance of a fee simple as indicated in the granting clause may be cut down to a lesser estate in the habendum[16] or in other parts of the deed.[17] The reversionary interest in a right of way was held included in a conveyance of land, notwithstanding the right of way was reserved and excepted in the granting clause, where the latter was immediately followed by an expression of intention to convey "all the interests, estates in remainder and reversion, rights of forfeiture and re-entry thereof."[18]

§ 141. **Inconsistent Recitals and Covenants.**—Plain operative words of quitclaim are not to be construed as merely a release of mortgage, notwithstanding such instrument begins with the recital that the grantees named are desirous of having their land relieved from the operation of a certain mortgage.[19] Nor are words purporting to convey a fee cut down or restricted to words of quitclaim by the recital in a trust agreement—properly construed with the deed—of the execution of the deed whereby the grantor "did convey all her right, title, interest, estate and claim

14. Morrison v. Wilson, 30 Cal. 344, ("It is in its very terms an exposition of the sense in which the words making up the first clause are used by the parties. It is but a videlicet.")

15. Faivre v. Daley, 93 Cal. 664, 29 Pac. 256.

16. Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Montgomery v. Sturdivant, 41 Cal. 290; Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896.

17. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

18. East San Mateo L. Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634.

19. MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

in the property."[20] An expression of the purpose of the conveyance as to the use of the property conveyed,[1] "as for the purpose of a public road,"[2] or "for a county high-school ground and premises,"[3] or for certain religious and educational purposes,[4] are generally held to be directory only, and not to qualify or limit a grant which is in absolute form. But this principle is not applicable where the qualifying words are in the granting part of the deed, and so clearly connected with the word "grant" as naturally to suggest that the intention was merely to convey the right to use the property for a certain purpose.[5] A covenant for further assurance does not destroy the effect of present words of conveyance in a quitclaim deed.[6] And a covenant in the habendum of such a deed that any after-acquired title should vest in the grantee, does not enlarge the effect of the operative words of quitclaim.[7]

After-acquired Title.

§ 142. Early Rule and Its Basis.—By the common law there were only two classes of conveyances which were held to operate upon an after-acquired title, namely, those by feoffment, by fine, or by common recovery, and those by indenture of lease; the former from their solemnity and publicity, and the latter from their implied covenants. On

20. Younger v. Moore, 155 Cal. 767, 103 Pac. 221 (holding the deed carried an after-acquired title; see infra, § 143).

1. Yuba Inv. Co. v. Yuba Consol. Gold Fields, 184 Cal. 469, 194 Pac. 19.

2. Cooper v. Selig, 32 Cal. App. Dec. 604, 191 Pac. 983 (holding the fact that the "reversion" was included in the granting clause was some evidence of an intention to convey the entire estate).

3. Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794.

4. Eldredge v. See Yup Co., 17 Cal. 44.

5. Cooper v. Selig, 32 Cal. App. Dec. 604, 191 Pac. 983 (distinguishing Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465, on this ground). See, generally, supra, §§ 125, 126.

6. Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112.

7. Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500.

the other hand, a grant or release without covenant of warranty passed only the estate which was vested in interest at the time. Thus, it became the established rule in the United States, based upon the common law, that no estate could be passed by the ordinary terms of a deed unaccompanied with covenants of warranty which was not vested in interest at the time, and that estates subsequently acquired, whether by purchase or descent, were unaffected by such previous conveyance in the hands of the grantor or those claiming under him. The general doctrine, however, was subject to the qualification that where, in the absence of warranty, it distinctly appeared on the face of the deed by express terms or necessary implication that the grantor was seised or possessed of a particular estate, which the deed purported to convey, the grantor was estopped from denying the operation of the deed according to such intent.[8]

§ 143. **Statutory Rule.**—The code provides: "Where a person purports by proper instrument to grant property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee, or his successors."[9] And a similar statutory provision existed prior to the code.[10] The effect of such a deed as matter of law is the same as if it were written upon the face thereof that the grantor conveyed all the estate which he then possessed, or which he might at any time thereafter acquire. While this has been declared to be a fundamental rule,[11] it is to be observed, as pointed out in the preceding paragraph, that it was not the rule at common law, authority for the doctrine being found in statutory provisions, and the effect of the grant is to give to such conveyances an operation equivalent to the most

8. Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

9. Civ. Code, § 1106.

10. Section 33, act concerning conveyances, Stats. 1850, p. 252.

11. Younger v. Moore, 155 Cal. 767, 103 Pac. 221.

expressive covenant of warranty.[12] Indeed, their effect goes beyond the usual covenant of warranty, for in addition to the force of the conveyance as a grant of an after-acquired interest, under the statute, the deed creates an estoppel, against the grantor,[13] being distinguished in this respect from a deed with a covenant of warranty which operates upon a future acquired interest, not as in fact passing such interest, but only by way of estoppel upon the grantor against its assertion.[14] There was no principle of the Mexican law making an after-acquired title inure to the benefit of a former grantee.[15]

§ 144. Deed Purporting to Convey Fee.—In accordance with the above statutory provision,[16] a deed purporting to convey a fee passes any after-acquired title,[17] regardless of any intervening deed to another grantee with notice of the prior deed.[18] The rule applies where the grantor had at the time of the execution of the deed only an undivided interest,[19] or even no title whatever.[20] And the operation of the rule is not defeated though the instrument

12. Younger v. Moore, 155 Cal. 767, 103 Pac. 221 (applying Civ. Code, § 1106); Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449 (applying statute of 1850, p. 252).

13. See infra, § 144.

14. Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449. See COVENANTS, vol. 7, p. 761; and as to estoppel, see supra, § 97; and see, generally, ESTOPPEL.

15. Bixby v. Bent, 59 Cal. 522 (distinguishing Schmitt v. Giovanari, 43 Cal. 617).

16. See supra, § 143.

17. Danziger v. Benson, 175 Cal. 565, 166 Pac. 313; Rianda v. Watsonville Water etc. Co., 152 Cal. 523, 93 Pac. 79; Ryder, Estate of, 141 Cal. 366, 74 Pac. 993; Merrill v. Clark, 103 Cal. 367, 37 Pac. 238; Green v. Green, 103 Cal. 108, 37 Pac. 188; De Frieze v. Quint, 94 Cal. 653, 28 Am. St. Rep. 151, 30 Pac. 1; Pekin Min. & Mill. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679; Klumpke v. Baker, 68 Cal. 559, 10 Pac. 197; Stanway v. Rubio, 51 Cal. 41; Dalton v. Hamilton, 50 Cal. 422; Green v. Clark, 31 Cal. 591; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Stark v. Barrett, 15 Cal. 361; Hitchens v. Nougues, 11 Cal. 28; Rowley v. Davis, 34 Cal. App. 184, 167 Pac. 162.

18. Merrill v. Clark, 103 Cal. 367, 37 Pac. 238.

19. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Younger v. Moore, 155 Cal. 767, 103 Pac. 221.

20. Merrill v. Clark, 103 Cal. 367, 37 Pac. 238; Cecil v. Gray, 170 Cal. 137, 148 Pac. 935.

is a mortgage, if it is in fact an absolute conveyance in form.[1] The effect of such a deed is to estop the grantor, as against the grantee, from asserting an after-acquired title to any part of the property which he has thus assumed to convey.[2] But where a grantee of a void grant reconveyed part of the granted premises to the grantor, with the intent that the second interest should be satisfied out of the first, there was no estoppel which would fill an after-acquired title of the second grantor in favor of the first grantor. In such case each party is estopped by his own deed, and the one estoppel neutralizes the other.[3] It is to be noted, however, that a subsequently acquired title does not relate back so as to give effect to a void instrument.[4] And following the principle that equity regards substance rather than form,[5] the effect of the rule cannot be defeated in equity by the taking of an after-acquired title in the name of a third person who has no real interest in the transaction.[6]

§ 145. Grant of Present Interest.—A deed which purports to grant and convey merely the present interest of the grantor is not within the above rule, and does not pass a title afterwards acquired,[7] even though it contain a covenant of warranty.[8] Such a covenant attaches merely to the interest which the deed purports to convey,[9] and does

1. Orr v. Stewart, 67 Cal. 275, 7 Pac. 693; Sherman v. McCarthy, 57 Cal. 507; Christy v. Dana, 42 Cal. 174; Kirkaldie v. Larrabee, 31 Cal. 455, 89 Am. Dec. 205; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449. See Civ. Code, § 2930, expressly applying the principle to mortgages; and see MORTGAGES.

2. Cecil v. Gray, 170 Cal. 137, 148 Pac. 935; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; De Frieze v. Quint, 94 Cal. 653, 28 Am. St. Rep. 151, 30 Pac. 1; Hitchens v. Nougues, 11 Cal. 28.

3. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

4. Powell v. Patison, 100 Cal. 236, 34 Pac. 677.

5. See EQUITY.

6. Quivey v. Baker, 37 Cal. 465,

7. People v. Blake, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313; Bixby v. Bent, 59 Cal. 522.

8. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Barrett v. Birge, 50 Cal. 659; Kimball v. Semple, 25 Cal. 440; Gee v. Moore, 14 Cal. 472.

9. See COVENANTS, vol. 6, p. 771.

not cause the after-acquired interest of the grantor to inure to the benefit of his grantee.[10] An execution deed comes within this category, not purporting to convey the fee, but only the right, title and interest of the judgment debtor.[11] But a deed conveying the present interest of the grantor acquired under a proceeding to purchase public lands forms an exception to this principle.[12]

§ 146. Quitclaim Deed.—A quitclaim deed does not purport to pass a fee simple,[13] but only to release and quitclaim whatever interest the grantor possesses at the time.[14] Hence it does not, as a rule, pass a title subsequently acquired by the grantor,[15] or preclude him from afterwards acquiring and holding the title for his own benefit,[16] even though he had no interest at the time to convey.[17] And of course such after-acquired title cannot inure to the benefit of one who has succeeded by deed to the interest of the first grantee.[18] This principle has been held to apply, even though the quitclaim deed contained a qualified warranty against a specified adverse claim set up by a third person, or contained a covenant in the habendum clause

10. Kimball v. Semple, 25 Cal. 440.

11. Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120; Kenyon v. Quinn, 41 Cal. 325.

12. Stanway v. Rubio, 51 Cal. 41.

13. Graff v. Middleton, 43 Cal. 341.

14. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; City etc. of San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187. See, also, § 138.

15. Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994; Rosenthal v. Silveria, 42 Cal. App. 637, 184 Pac. 58; Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Cadiz v. Majors, 33 Cal. 288; Morrison v. Wilson, 30 Cal. 344; Merle v. Meagher, 1 Cal. Unrep. 644; House v. Ponce, 13 Cal. App. 279, 109 Pac. 161; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Gee v. Moore, 14 Cal. 472; Quivey v. Baker, 37 Cal. 465.

16. McDonald v. Edmonds, 44 Cal. 328; Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764; City etc. of San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187.

17. Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500.

18. Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994.

that any after-acquired title should vest in the grantee.[19] But it is apparent that an exception might exist under the principle of estoppel already referred to,[20] as, for instance, where a quitclaim deed affirms expressly or impliedly, without covenant of warranty, that the grantor is seized of a particular estate which the deed purports to convey.[1] A further exception is found in cases where the grantor has acquired an inchoate interest in public lands under proceedings to purchase, and has quitclaimed his interest prior to confirmation or the issuance of the patent.[2] The title in such cases is held to relate back to the inception of the proceedings, and the effect of the patent is to confirm in the grantee the title which had formerly been in his grantor.[3] But where the grantor had no interest to transfer, as where he had merely filed his application to purchase, the after-acquired title did not pass,[4] even though the deed expressly recited that such title should pass.[5]

Future Interests and Estates.

§ 147. Future Estate—Early Rule.—At common law an estate of freehold could not be granted to commence in futuro, without the creation at the same time of a particular estate, which vested in immediate possession in some other person. This rule was of feudal origin. After

19. Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500 (so holding because the habendum clause refers to and acts upon the interest conveyed most frequently limiting and qualifying such interest).

20. See supra, § 144.

1. Ann. Cas. 1913C, 369, note.

2. Thompson v. Spencer, 50 Cal. 532 (principle applied in case of grant of pueblo lands by town authorities); Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Watkins v. Lynch, 71 Cal. 21, 11 Pac. 808; Crane v. Salmon, 41 Cal. 63; Schmitt v. Giovanari, 43 Cal. 617. See PUBLIC LANDS.

3. Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112.

4. People v. Blake, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313.

5. Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500 (approved in Polk v. Sleeper, 158 Cal. 634, 112 Pac. 179. See PUBLIC LANDS).

delivery of seizin[6] was no longer necessary to effectuate a conveyance, the rule became a technical one; but it remained a rule of property in California until abrogated by the code.[7] Under such rule, a deed purporting to create an estate to take effect in the future, as in the case of an absolute grant reserving a precedent life estate in the grantor, was void and inoperative as a conveyance.[8] A future estate of freehold, however, could be created by deed at common law under the Statute of Uses, either as a covenant to stand seized, or by bargain and sale to the use of another.[9] Whether the Statute of Uses was ever adopted in California as a part of the common law seems to be in doubt. But even if such statute was not in force at the time of the execution of a deed, a court of equity would, as before the statute, treat the transaction as a contract, and if the covenant to stand seized, or bargain and sale, was supported by a proper consideration, would consider the actual rights of the parties, and construe the instrument in such manner as to effectuate their intention.[10] It has been said that the early rule applied only to legal estates.[11]

§ 148. **Statutory Rule.**—Any objection to which deeds creating a future estate may have been subject at common law has been removed by section 767 of the Civil Code,[12]

6. See supra, § 4.

7. Hawes v. Stebbins, 49 Cal. 369.

8. Peck v. Vandenberg, 30 Cal. 11 (per Sawyer, J.); Hawes v. Stebbins, 49 Cal. 369; Chandler v. Chandler, 55 Cal. 267. As to whether leasehold interests come within the rule, see LANDLORD AND TENANT.

9. Chandler v. Chandler, 55 Cal. 267 (but holding it was unnecessary to decide the question).

10. Chandler v. Chandler, 55 Cal. 267 (holding, in an action to quiet title, that the decree should provide for appropriate conveyances to carry out the evident object of the deed, which was to convey subject to a precedent life estate in the grantor; also holding that statute of enrollments, i. e., 27 Hen. VIII, c. 16, has never been in force in California).

11. Blakeman v. Miller, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587.

12. Blakeman v. Miller, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587; Hawes v. Stebbins, 49 Cal. 369; Chandler v. Chandler, 55 Cal.

which reads: "A future estate may be limited by the act of the party to commence in possession at a future day, either with or without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time."[13] Thus, the enjoyment of the estate conveyed may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate.[14] The fact that no disposition is made by the deed of the interest intervening in time and enjoyment between the date of the deed and the death of the settlor cannot affect the conveyance.[15] The same principles are applicable to a deed delivered to a third person to be delivered to the grantee upon the grantor's death, which is held to operate as a conveyance subject to a life estate reserved to the grantor.[16]

§ 149. Interests not Presently Vested.—It is not intended to treat in this article of particular expectancies or remainders, except in so far as necessary in considering whether a deed is valid which purports to convey an interest which will vest in the grantor at some future time.[17] The Civil Code provides that: "Future interests pass by succession, will and transfer in the same manner as present interests."[18] The code also provides that: "A mere possibility, not coupled with an interest, cannot be transferred";[19] and further: "A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind."[20] The two code sections last cited

267. And see cases cited infra, this section.

13. Civ. Code, § 767; and compare § 773 and § 707 of the same code.

14. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867.

15. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867.

16. Wilhoit v. Salmon, 146 Cal. 444, 80 Pac. 705. See supra, § 70.

17. See REMAINDERS; REVERSIONS.

18. Civ. Code, § 699.

19. Civ. Code, § 1045.

20. Civ. Code, § 700.

above are intended to state the rule at the common law.[1] Thus, a deed by an heir apparent, prior to the death of his ancestor, and purporting to convey his expectant interest as such heir, is legally void for want of any interest then to be conveyed. Although such a deed may in some cases be enforced in equity as an agreement to convey, or by way of estoppel, it is not a conveyance of the legal title.[2] A possibility of reverter upon breach of condition subsequent, while not such an interest as could be transferred at common law, though termed a "vested interest,"[3] has by code provision been made a contingent estate, a species of property, capable of transfer.[4] Likewise one may convey a possibility of reverter after a grant of an estate determinable by limitation.[5] But a contingent remainder which has not vested is not such a future interest as can be conveyed;[6] though if vested the rule is otherwise, even though it remains a contingent interest.[7]

IX. PROPERTY CONVEYED.

§ 150. General Rule.—The right to acquire and possess property, guaranteed by the constitution, includes the right to dispose of it, or of any part of it, and for that

1. In re Garcelon, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414.

2. Estate of Ryder, 141 Cal. 366, 74 Pac. 993; Estate of Wickersham, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437. See ASSIGNMENTS, vol. 3, p. 247 et seq.

3. Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159.

4. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047 (approved in Strong v. Shatto, 45 Cal. App. 729, 187 Pac. 159). Civ. Code, § 1046: "A right of entry, or of repossession for breach of condition subsequent, can be transferred."

5. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097 (approved in Johnston v. City of Los Angeles, 176 Cal. 459, 168 Pac. 1047).

6. County of Los Angeles v. Winans, 13 Cal. App. 257, 109 Pac. 650; Hall v. Wright, 17 Cal. App. 502, 120 Pac. 429.

7. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306 (implied); Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. See REMAINDERS.

purpose to divide it in any possible manner.[8] Accordingly, while it is a well-recognized principle that, in the absence of express reservation, a conveyance of land carries not only the surface of the earth within the described limits but everything above and below it,[9] land may also be divided horizontally, as by a conveyance of all surface rights of a mining claim;[10] or it may be severed in irregular sections or quantities, as by a conveyance or reservation of a mineral lode or quartz vein.[11] Likewise, a distinct and different ownership as a subject of transfer may exist with reference to the different stories of a building,[12] and with reference to land and the growing and unsevered timber,[13] as well as structures thereon;[14] such structures including canals and ditches.[15] Rights in the nature of incorporeal hereditaments may be severed from land and transferred by deed, such as rights of way,[16]

8. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242, See PROPERTY.

9. Central Eureka M. Co. v. East Cent. Eureka M. Co., 146 Cal. 147, 9 L. R. A. (N. S.) 940, 79 Pac. 834.

10. Riley v. North Star M. Co., 152 Cal. 549, 93 Pac. 194; Roberts v. Abbott, 32 Cal. App. Dec. 1026, 192 Pac. 345.

11. Riley v. North Star M. Co., 152 Cal. 549, 93 Pac. 194; Central Eureka M. Co. v. East Cent. Eureka M. Co., 146 Cal. 147, 9 L. R. A. (N. S.) 940, 79 Pac. 834. See MINES AND MINERALS.

12. McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984; Thompson v. McKay, 41 Cal. 221; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172 (inferred).

13. Peterson v. Gibbs, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Anderson v. Palladine, 39 Cal. App. 256, 178 Pac. 553; Ciapusci v. Clark, 12 Cal. App. 44, 106 Pac. 436. See LOGS AND TIMBER.

14. Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130; Fudickar v. East Riverside I. Dist., 109 Cal. 29, 41 Pac. 1024 (implied); Dietz v. Mission Transf. Co., 95 Cal. 92, 30 Pac. 380; Sparks v. Hess, 15 Cal. 186 (approved in Mitchell v. Amador Canal etc. Co., 75 Cal. 464, 17 Pac. 246).

15. Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Fudickar v. East Riverside I. Dist., 109 Cal. 29, 41 Pac. 1024 (implied); Reed v. Spicer, 27 Cal. 57.

16. Jones v. Sanders, 138 Cal. 405, 71 Pac. 506; Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Wood v. The Truckee Turnpike Co., 24 Cal. 474; Jones v. Deardoff, 4 Cal. App. 18, 87 Pac. 213. See EASEMENTS.

water rights,[17] and rights in the nature of profits a prendre.[18] It seems to have always been assumed that land may be conveyed in undivided fractional interests, in which case the owners of the various interests become tenants in common.[19] And it seems that an owner of land may, under some circumstances, grant a specific, as distinguished from a general, undivided fractional interest therein.[20] The rule as to what accompanies a grant as incidents and appurtenances is stated in following paragraphs. A deed of land passes the gold and silver minerals therein unless expressly reserved.[1] And an imperceptible accretion passes by deed of land which it adjoins.[2]

§ 151. What Passes by Grant or Transfer.—The Civil Code provides that

"One who grants a thing is presumed to grant also whatever is essential to its use."[3]

"The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself."[4]

In a grant of land everything essential to the beneficial use and reasonable enjoyment of the property conveyed is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee.[5] Whatever is parcel of it, or of the essence

17. Duckworth v. Watsonville Water etc. Co., 170 Cal. 425, 150 Pac. 58; Gould v. Stafford, 91 Cal. 146, 27 Pac. 543; Farmer v. Ukiah Water Co., 56 Cal. 11; Smith v. Williams, 6 Cal. Unrep. 192, 55 Pac. 600. See WATERS.

18. Robert v. Krafts, 141 Cal. 20, 74 Pac. 281; Payne v. Neuval, 155 Cal. 46, 99 Pac. 476; Smith v. Cooley, 65 Cal. 46, 2 Pac. 880. See EASEMENTS.

19. See COTENANCY.

20. Hartman v. Reed, 50 Cal. 485,

1. Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123.

2. Tappendorf v. Downing, 76 Cal. 169, 18 Pac. 247. See WATERS.

3. Civ. Code, § 3522.

4. Civ. Code, § 1084. See cases cited infra, § 152.

5. Tarpey v. Lynch, 155 Cal. 407, 101 Pac. 10; Rubio Canyon Land etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; Stanislaus Water Co. v. Bachman, 152 Cal.

of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes by the grant.[6] And the principal thing or subject of the transfer to which the incident attaches may be the land, or a building or other structure upon the land.[7] Also, whatever is appurtenant to the land conveyed, passes with it without mention, as by the use of the word "appurtenances" or otherwise.[8] And a transfer of real property passes all easements attached thereto, and creates in favor thereof, an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.[9]

716, 15 L. R. A. (N. S.) 359, 93 Pac. 858; Jones v. Sanders, 138 Cal. 405, 71 Pac. 506; Kennedy v. Burnap, 120 Cal. 488, 40 L. R. A. 476, 52 Pac. 843; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Smith v. Cooley, 65 Cal. 46, 2 Pac. 880; Cave v. Crafts, 53 Cal. 135; Sparks v. Hess, 15 Cal. 186; Rodemeyer v. Meger, 30 Cal. App. 514, 158 Pac. 1047; Trimble v. Hellar, 23 Cal. App. 436, 138 Pac. 376; Crozer v. White, 9 Cal. App. 612, 100 Pac. 130; Gardner v. San Gabriel V. Bank, 7 Cal. App. 106, 93 Pac. 900.

6. Sparks v. Hess, 15 Cal. 186; Crozer v. White, 9 Cal. App. 612, 100 Pac. 130. See FIXTURES.

7. See infra, § 152.

8. See infra, § 152.

An acceptance of a deed is an acceptance of all it conveys. Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

9. Civ. Code, § 1104; Jacques v. Tomb, 179 Cal. 444, 177 Pac. 280; Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025 (applying rule to a devise); Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624 (stating rule); Jones v. Sanders, 138 Cal. 405, 71 Pac. 506; Tarpey v. Lynch, 155 Cal. 407, 101 Pac. 10; Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Kennedy v. Burnap, 120 Cal. 488, 40 L. R. A. 476, 52 Pac. 843; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Cross v. Kitts, 69 Cal. 217, 58 Am. St. Rep. 558, 10 Pac. 409; Cave v. Crafts, 53 Cal. 135; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Rodemeyer v. Meger, 30 Cal. App. 514, 158 Pac. 1047; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223.

Such easements are not to be confounded with a right of way created by necessity which is not created by grant but derived from law. Tarpey v. Lynch, 155 Cal. 407, 101 Pac. 10. See EASEMENTS.

§ 152. Incidents and Appurtenances Generally.—It is a general rule under the code[10] that incidents and appurtenances to lands pass with a transfer thereof unless expressly excepted.[11] It is also a provision of the code that

"A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another."[12]

The phrase "by right used with the land" does not refer to the owner's title to the incident, but has reference to the rightful use by which the incident has become an adjunct to the land, and remains such so long as it can be used therewith without lawful interference by third persons. Thus, a water right may be appurtenant to land, though the water is brought from its source over intervening land, partly without right and partly by a revocable license.[13] However, not every "thing" is deemed to be appurtenant even when by semblance of right used with the land for its benefit, as in the case of light and air.[14] An appurtenance is that which belongs to another thing, but which has not belonged to it immemorially. It is the nature and use of the thing annexed which makes it appurtenant or not, as the case may be; and it may be of a corporeal or incorporeal nature.[15] In law, appurtenant denotes an annexation which is of convenience merely, and not of necessity, and which may have had its origin at any time, in both of which respects it is distin-

10. See Civ. Code, § 1084, quoted supra, § 151.

11. Taylor v. Avila, 175 Cal. 203, 165 Pac. 533; Wolff v. Cloyne, 156 Cal. 746, 106 Pac. 104; Rubio Canyon Land etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 15 L. R. A. (N. S.) 359, 93 Pac. 858; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Cave v. Crafts, 53 Cal. 135; Sparks v. Hess, 15 Cal. 186; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Trimble v. Hellar, 23 Cal. App. 436, 138 Pac. 376.

12. Civ. Code, § 662.

13. Crooker v. Benton, 93 Cal. 365, 28 Pac. 953. See WATERS.

14. Kennedy v. Burnap, 120 Cal. 488, 40 L. R. A. 476, 52 Pac. 843.

15. See infra, §§ 153, 154.

guished from appendant.[16] But to be the subject of a grant a thing must have actual or potential existence.[17]

§ 153. Incorporeal Interests as Appurtenant to Land.—Privileges such as easements attached to land pass with the land by express code provision.[18] Such a right appurtenant differs from a right in gross which cannot be assigned, nor transmitted by descent, and which dies with the person.[19] Questions as to what constitutes an easement as distinguished from other rights in land, and whether an easement exists in any particular case, are considered elsewhere.[20] The most frequent example of what passes as incident or appurtenant to land is property or property interests of an incorporeal nature, such as rights of way,[1] water rights,[2]

16. Farmer v. Ukiah Water Co., 56 Cal. 11.

17. Mitchell v. Amador Canal etc. Co., 75 Cal. 464, 17 Pac. 246.

18. Civ. Code, § 1104.

19. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879. See EASEMENTS.

20. See EASEMENTS.

1. Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87 (involves passing of right of way by equitable estoppel; see ESTOPPEL). Wolff v. Cloyne, 156 Cal. 746, 106 Pac. 104; Rubio Canyon Land etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; Corea v. Higuera, 153 Cal. 451, 17 L. R. A. (N. S.) 1018, 95 Pac. 882; Currier v. Howes, 103 Cal. 431, 37 Pac. 521; Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Taylor v. Warnsky, 55 Cal. 350; Cave v. Crafts, 53 Cal. 135; Kittle v. Pfeiffer, 22 Cal. 484; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Gardner v. San Gabriel V. Bank, 7 Cal. App. 106, 93 Pac. 900. See, also, EASEMENTS.

A right of way is no less an appurtenance, because not actually used as such at the time of the conveyance, and though expressed to be for the benefit of a building to be subsequently erected. Gardner v. San Gabriel V. Bank, 7 Cal. App. 106, 93 Pac. 900.

2. Stanislaus Water Co. v. Bachman, 152 Cal. 716, 15 L. R. A. (N. S.) 359, 93 Pac. 858; Rianda v Watsonville Water etc. Co., 152 Cal. 523, 93 Pac. 79; Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107; Crooker v. Benton, 93 Cal. 365, 28 Pac. 953; McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Standart v. Round Valley Water Co., 77 Cal. 399, 19 Pac. 689; Farmer v. Ukiah Water Co., 56 Cal. 11; Quirk v. Falk, 47 Cal. 453; McDonald v. Bear River etc. Min. Co., 13 Cal.

rights of profit a prendre,[3] and rights to rents, issues and profits.[4]

§ 154. Appurtenances of a Corporeal Nature.—While, as a general rule, land does not pass as appurtenant to other land, yet it may be of such a nature as to pass with the principal thing, and this doctrine is not inconsistent with the statutory definition of an appurtenance.[5] Thus, a water ditch will pass as appurtenant to a mining claim,[6] and a conveyance of a ditch will carry title to another ditch used as an appurtenance thereto.[7] It is a general principle of law that a building permanently affixed to the freehold becomes a part of it,[8] but while a conveyance of land ordinarily passes the buildings thereon without mention,[9] it has been held that a deed of land by one in possession, but having no transferable interest therein, did not convey the improvements erected by him where it only purported to convey the land.[10] Upon the same principle, subject to a qualification of the rule as between landlord and tenant,[11] chattels annexed to land as fixtures become appurtenances thereto and pass by deed of the land.[12] Similarly, artificial waterways such as pipe-lines and conduits will pass with land when appurtenant to a mill or

220; Trimble v. Hellar, 23 Cal. App. 436, 138 Pac. 376.

3. Painter v. Pasadena L. & W. Co., 91 Cal. 74, 27 Pac. 539.

4. Garber v. Gianella, 98 Cal. 527, 33 Pac. 458.

5. McShane v. Carter, 80 Cal. 310, 22 Pac. 178. See supra, § 152.

6. McShane v. Carter, 80 Cal. 310, 22 Pac. 178 (citing a case from another jurisdiction where it was held that an adjoining parcel of land passed by a grant of a canal); Quirk v. Falk, 47 Cal. 453 (the burden of establishing the ditch as an appurtenance being upon the party asserting it to be such).

7. Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Mitchell v. Amador Canal etc. Co., 75 Cal. 464, 17 Pac. 246 (but holding the second ditch was not an appurtenance where constructed to take the place of the first ditch). See WATERS.

8. Civ. Code, § 658.

9. Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130.

10. Daubenbiss v. White, 3 Cal. Unrep. 590, 31 Pac. 260.

11. See LANDLORD AND TENANT.

12. Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130; Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251; Merritt v. Judd, 14 Cal. 60; Sands v. Pfeiffer, 10 Cal. 258. See FIXTURES.

dwelling-house thereon.[13] Land will sometimes pass by a deed without any specific designation of it as land, as where one conveys a building or structure affixed to land. In such case, in the absence of language indicating a different intention, the deed passes the land on which the building or structure stands,[14] or so much land as may be necessary for its ordinary use.[15] And this principle is not inconsistent with the doctrine that distinct ownership may exist with reference to the land and the structures thereon.[16] In a case where a lessee of an oil lease granted, bargained and sold the buildings, pipe-lines, fixtures and all other personal property on the premises, it was said that the grantee thereby acquired the right to operate the same in like manner as they had theretofore been operated.[17] Franchises are principal things and lie in grant as such; they are appurtenant to nothing.[18]

X. DESCRIPTION.

Certainty and Rules of Construction.

§ 155. In General.—The general rule in regard to the construction of the description of the premises in a deed is

13. McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Standart v. Round Valley Water Co., 77 Cal. 399, 19 Pac. 689.

14. McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Sparks v. Hess, 15 Cal. 186. (It is said that "the grant of a messuage, or a messuage with the appurtenances, will pass the dwelling-house and adjoining buildings, and also its curtilage, garden and orchard, together with the close in which the house is built." Distinguished in Wood v. Truckee Turnpike Co., 24 Cal. 474.) McDonald v. Bear River etc. M. Co., 13 Cal. 220.

15. Pottkamp v. Buss, 3 Cal. Unrep. 694, 31 Pac. 1121.

16. Sparks v. Hess, 15 Cal. 186. See supra, § 150.

17. Dietz v. Mission Transfer Co., 95 Cal. 92, 30 Pac. 380 (dissenting opinion, holding that the transfer should be construed as passing no other interest than the title to the personal property mentioned, there being nothing in the instrument of transfer "descriptive of any purpose or use in which the land is an essential element for its enjoyment"). See OIL AND GAS.

18. Wood v. The Truckee Turnpike Co., 24 Cal. 474. See FRANCHISES.

one of the utmost liberality.[19] The intent of the parties, if, by any possibility, it can be gathered from the language employed, will be effectuated.[20] And in ascertaining the intention the entire description contained in the deed is to be resorted to.[1] The construction placed upon the description must not only be reasonable but such as will give effect to the deed rather than defeat it.[2] But the court cannot reject some words of a description and interpolate others in order to give effect to an apparent intention.[3] While the rules of construction applicable to judicial deeds differ in many respects from those applicable to the deeds of private persons, in respect to the description of the property they are the same, whether the deed is made by a party in his own right or by an officer of the court.[4] However, the rule as to certainty in cases where it is sought to divest the owner of his title in proceedings in invitum, should be less stringent in its application to like questions arising in private transfers by deed.[5] Much less liberality is allowed in construing and curing defective descriptions in deeds than in contracts of sale.[6] In grants of real estate it is not always necessary to describe it by metes and bounds, or by reference to actual or artificial

19. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Aguire v. Alexander, 58 Cal. 21; California Packing Corp. v. Grove, 34 Cal. App. Dec. 409, 196 Pac. 891.

20. Miller v. Grunsky, 141 Cal. 441, 75 Pac. 48; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Aguirre v. Alexander, 58 Cal. 21; Wade v. Deray, 50 Cal. 376; Serrano v. Rawson, 47 Cal. 52; Piercy v. Crandall, 34 Cal. 334; Ferris v. Coover, 10 Cal. 589; California Packing Corp. v. Grove, 34 Cal. App. Dec. 409, 196 Pac. 891; Farnham v. Huston, 39 Cal. App. 687, 179 Pac. 701; Beall v. Weir, 11 Cal. App. 364, 105 Pac. 133.

1. Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Serrano v. Rawson, 47 Cal. 52; Piercy v. Crandall, 34 Cal. 334; Farnham v. Huston, 39 Cal. App. 687, 179 Pac. 701.

2. Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176 (applying §§ 3541, 3542, Civ. Code).

3. Hayes v. Wetherbee, 60 Cal. 396.

4. White v. Luning, 93 U. S. 514, 23 L. Ed. 938.

5. Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512 (citing instances of tax deeds).

6. Lange v. Waters, 156 Cal. 142, 103 Pac. 889; California Packing

monuments, nor by courses and distances.[7] A deed cannot convey more than is described in it.[8]

§ 156. **Necessity of Certainty.**—To be valid on its face, a deed must contain such a description of the property intended to be conveyed as will enable it to be readily located by reference to the description, and where the description is so vague and uncertain that the property cannot be identified and located therefrom, and the writing itself does not furnish the means for making the description definite and certain, the deed is void,[9] in view of the rule that a conveyance of real estate must be in writing.[10] Thus, a deed is void for uncertainty in which a description by metes and bounds omits a section of the boundary,[11] or the calls of which would be satisfied by starting from any point on a specified creek several thousand feet in length,[12] or where the deed makes no reference to any object or thing which might lead to an identification of the tract intended to be conveyed;[13] or where it shows on its face two parcels of land to which the description equally applies.[14] Similarly, a description of land ex-

Corp. v. Grove, 34 Cal. App. Dec. 409, 196 Pac. 891.

7. Leonard v. Osburn, 169 Cal. 157, 146 Pac. 530; Togni v. Slocomb, 12 Cal. App. 733, 108 Pac. 723. See infra, §§ 170–178. See BOUNDARIES, vol. 4, p. 374.

8. Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

9. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; McCollough v. Olds, 108 Cal. 529, 41 Pac. 426; Thompson v. Southern California Motor Road Co., 82 Cal. 500, 23 Pac. 130; Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33; Mesick v. Sunderland, 6 Cal. 297; People v. Klumpke, 41 Cal. 263; Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543; Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209.

10. Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543.

It would be a contradiction in terms to say that a specific tract was granted, if there was nothing in the grant by which it could be ascertained with reasonable certainty what particular parcel was intended to be conveyed. Banks v. Moreno, 39 Cal. 233.

11. Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543.

12. Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209.

13. Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543.

14. People v. Klumpke, 41 Cal. 263.

cepted from a grant may be so uncertain as to render the exception void.[15] It is not competent for a court of equity to supply defects in a description in a deed.[16]

§ 157. Rules of Certainty.—Generally speaking, a deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed,[17] with reasonable certainty,[18] either by the calls of the instrument as applied to the land, or by the descriptive features of the grant.[19] If the property can be identified by the description by a competent surveyor,[20] with or without the aid of extrinsic evidence,[1] nothing more is required. And a deed is not void for uncertainty because of errors or inconsistency in some of the particulars of the description.[2] It is a rule established by the code applicable to descriptions that "when the construction is doubtful and there are no other sufficient circumstances to determine it,"[3] that "where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but is to be construed by the first mentioned particulars."[4] The apparently false calls may be rejected, and if a sufficient description remains to enable the premises intended to be conveyed to

15. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889.

16. Leonis v. Lazzarovich, 55 Cal. 52.

17. Leonard v. Osborn, 169 Cal. 157, 146 Pac. 530; Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716.

18. Banks v. Moreno, 39 Cal. 233; Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512.

19. Banks v. Moreno, 39 Cal. 233; Togni v. Slocomb, 12 Cal. App. 733, 108 Pac. 723.

20. McDougald v. Southern Pac. R. R. Co., 162 Cal. 1, 120 Pac. 766; Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716; McCollough v. Olds, 108 Cal. 529, 41 Pac. 420.

1. Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512 (citing Best v. Wohlford, 144 Cal. 733, 78 Pac. 293).

2. Leonard v. Osburn, 169 Cal. 157, 146 Pac. 530; Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716.

3. Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48.

4. Code Civ. Proc., § 2077. See BOUNDARIES, vol. 4, p. 390.

be identified, the deed is sufficient.[5] And though a description is uncertain as to the extent or limits of a tract of land intended to be conveyed, it may be sufficient as to the part of the tract definitely described.[6] Whether or not a description is uncertain is to be determined from an inspection of the entire deed,[7] and the construction which satisfies the calls of a deed is to be preferred to that which renders a part of the description surplusage.[8]

§ 158. General Rule as to Conflicting Descriptions.— When a deed contains conflicting descriptions the court will harmonize and give effect to every part of the description if possible, but if this cannot be done it rejects that which is repugnant to the general intent of the instrument.[9] In ascertaining the intention the court will look into all the facts surrounding the parties when the instrument was made,[10] and give effect to the description which is the most definite and certain, and least likely to be mistaken or affected by errors.[11] It is upon this principle, for instance, that monuments or points are said to control

5. Los Angeles etc. Land Co. v. Marr, 178 Cal. 243, 173 Pac. 83; De Watson v. San Pedro etc. R. Co., 169 Cal. 520, 147 Pac. 140; Leonard v. Osburn, 169 Cal. 157, 146 Pac. 530; Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176; Murray v. Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Helm v. Wilson, 76 Cal. 476, 18 Pac. 604; Irving v. Cunningham, 66 Cal. 15, 4 Pac. 766; People v. Blake, 60 Cal. 497; Aguirre v. Alexander, 58 Cal. 21; Haley v. Amestoy, 44 Cal. 132; Walsh v. Hill, 38 Cal. 481; Piper v. True, 36 Cal. 606; Reamer v. Nesmith, 34 Cal. 624; Reed v. Spicer, 27 Cal. 57; Stanley v. Green, 12 Cal. 148; Ferris v. Coover, 10 Cal. 589; Farnham v. Huston, 39 Cal. App. 687, 179 Pac. 701; Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543; Borchard v. Eastwood, 6 Cal. Unrep. 736, 65 Pac. 1047; Belknap v. Garrison, 1 Cal. Unrep. 374; White v. Luning, 93 U. S. 514, 23 L. Ed. 938; Hamm v. San Francisco, 9 Sawy. 31, 17 Fed. 119.

6. Spect v. Gregg, 51 Cal. 198.

7. Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176.

8. Lake Vineyard Land etc. Assn. v. San Gabriel Orange etc. Assn., 58 Cal. 51.

9. More v. Massini, 37 Cal. 432; Havens v. Dale, 18 Cal. 359.

10. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Wade v. Deray, 50 Cal. 376.

11. Wade v. Deray, 50 Cal. 376; Walsh v. Hill, 38 Cal. 481; Piercy

courses and distances,[12] the degree of importance given to the one or the other being just in proportion to the liability of parties to err in reference to them. It may happen, however, in case of a clear mistake, that an inferior means of location will control a higher.[13]

§ 159. Particular as Against General Description.—It is a general rule that a general description of land, or interest therein, will not be restricted by a subsequent erroneous, uncertain or inconsistent particular description,[14] where the particular description is not used in a restrictive sense, but in the sense of reiteration or affirmation.[15] Thus, a grant of all the "right, title and interest" of the grantor, followed by words particularly describing the interest granted, such as "being a one-half undivided interest"[16] or "being a leasehold unexpired,"[17] is not limited by the particular recital. So, a grant of the undivided half of the interest of the grantor, followed by words descriptive of his whole interest, conveyed only the half interest, special ground for such construction being found in evidence of carelessness and omissions in drawing the deed.[18] And a grant of land located within certain streets and boundaries was held to control a following designation by numbered blocks.[19] This is in consonance with the

v. Crandall, 34 Cal. 334; Kimball v. Semple, 25 Cal. 440; Vance v. Fore, 24 Cal. 435; Castro v. Tennent, 44 Cal. 253; Ferris v. Coover, 10 Cal. 589.

12. Piercy v. Crandall, 34 Cal. 334. See BOUNDARIES, vol. 4, p. 397 et seq.

13. Ferris v. Coover, 10 Cal. 589. See BOUNDARIES, vol. 4, pp. 393, 400.

14. McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566; Wilcoxson v. Sprague, 51 Cal. 640; Wade v. Deray, 50 Cal. 376; Haley v. Amestoy, 44 Cal. 132; Piper v. True, 36 Cal. 606; Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491.

15. Aguirre v. Alexander, 58 Cal. 21 (per Ross, J., the main opinion holding that instructions upon the point were contradictory); Piper v. True, 36 Cal. 606.

16. McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566.

17. Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61.

18. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

19. Friedman v. Nelson, 53 Cal. 589.

general rule that where a conflict exists the true intent of the grantor as to what was intended to be conveyed is more likely to be found in the granting clause.[20] But when there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital.[1] The principle is controlled, however, by evidence of intent.[2] And where two conflicting descriptions are equally certain, other rules of construction may be invoked, such as that the deed is to be construed most strongly against the grantor.[3] But a description is to be construed so as to give all of its operative words effect.[4]

§ 160. Reference to Other Deeds, Writings, Records.—A deed may exclude[5] or incorporate[6] land by reference to a description contained in another instrument or deed, where the latter is sufficiently identified,[7] and the deed is not for that reason void for uncertainty.[8] But no instrument or map is admissible in evidence with the deed for that purpose unless it is the one referred to,[9] and the

20. See supra, § 125. (And see Dickson v. Wildman, 183 Fed. 398, 105 C. C. A. 618, citing cases from numerous jurisdictions.)

1. Hayes v. Wetherbee, 60 Cal. 396.

2. Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; King v. Samuel, 7 Cal. App. 55, 93 Pac. 391.

3. Hager v. Spect, 52 Cal. 579. See infra, § 168.

4. Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715.

It has been held that of two descriptions, that one should be taken as true which applies to land owned by the grantor, rather than the one which applies to land which he does not own. Piper v. True, 36 Cal. 606.

5. Marcone v. Dowell, 178 Cal. 396, 173 Pac. 465; De Sepulveda v. Baugh, 74 Cal. 468, 5 Am. St. Rep. 455, 16 Pac. 223; Norton v. Meader, 4 Sawy. 603, Fed. Cas. No. 10,351.

6. See infra, § 162.

7. Marcone v. Dowell, 178 Cal. 396, 173 Pac. 465.

8. McCullough v. Olds, 108 Cal. 529, 41 Pac. 420; De Sepulveda v. Baugh, 74 Cal. 468, 5 Am. St. Rep. 455, 16 Pac. 223; Thompson v. Thompson, 52 Cal. 154; Havens v. Dale, 18 Cal. 359; Norton v. Meader, 4 Sawy. 603, Fed. Cas. No. 10,351; affirmed, 78 U. S. (11 Wall.) 442, 20 L. Ed. 184.

9. Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131.

instrument or map must be clearly identified.[10] Accordingly, other maps made by third persons subsequently to the date of conveyance, being mere declarations of such persons, are not binding on the grantee.[11] But it is not necessary that a deed should refer to a map actually of record in order to make a description sufficient.[12] Reference may be made to a particular survey,[13] or to proceedings for the confirmation of public lands;[14] but a reference to a government survey has been held not to refer to mere experimental field-notes which had not been approved by the surveyor-general and of which the grantee was ignorant.[15] Where a deed refers to a map as the "official map" for a more specific description of the property conveyed, the map which is the official map at the date of the deed must be taken as the map referred to.[16] And a description of land which gave the course in part as being along the south bounds of an incorporated town was held to constitute a sufficient reference to the recorded map of such town.[17]

§ 161. Effect of Defective Reference.—A deed referred to for further description may be sufficiently identified by other means though falsely described as recorded.[18] And a map "deposited" in a recorder's office is properly referred to as being "of record" therein, even though it is not acknowledged.[19] So a reference to a map as recorded

10. Cadwalader v. Nash, 73 Cal. 43, 14 Pac. 385; Pettigrew v. Dobbelaar, 63 Cal. 396.

11. "If a man has really acquired title to land, he cannot afterward be mapped out of it by other persons." Payne v. English, 79 Cal. 540, 21 Pac. 952.

12. Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421. See infra, § 161.

13. Hudson v. Irwin, 50 Cal. 450; Fratt v. Toomes, 48 Cal. 28.

14. Vejar v. Mound City L. etc. Assn., 97 Cal. 659, 32 Pac. 713.

15. Fratt v. Toomes, 48 Cal. 28.

16. Penry v. Richards, 52 Cal. 496 (S. C., 52 Cal. 672).

17. Wheatley v. San Pedro etc. R. R. Co., 169 Cal. 505, 147 Pac. 135; de Watson v. San Pedro etc. R. R. Co., 169 Cal. 520, 147 Pac. 140.

18. Saunders v. Schmaelzle, 49 Cal. 59.

19. Colton Land & W. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

in a certain deed book at a particular page sufficiently identifies a map which is merely pasted on that page.[20] Nor is a deed of conveyance void for uncertainty where it identifies a map of the property conveyed by its record reference, but the map referred to is of a different tract or subdivision from that designated in the deed, if there was on record when the deed was made another map which alone answered the description.[1] In such case the false call for the map will be disregarded in accordance with principles already considered.[2] The fact that indorsements upon a map do not literally accord with the description in a deed does not necessarily destroy its identity.[3] An act to cure defects in maps or plats filed for record prior to January 1, 1917, and in deeds or conveyances relating to such maps, was passed by the legislature and approved in 1917.[4]

§ 162. Incorporating Description by Reference—Rule Stated.—Where a deed refers to another instrument or map or record for a description of the land conveyed, such instrument or map is to be deemed a part of the deed and is to be construed with it,[5] as much so as if it had been

20. McCullough v. Olds, 108 Cal. 529, 41 Pac. 420 (virtually overruling Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131. "It is a matter of common knowledge that it has been customary to deposit maps in the office of the county recorder and to refer to them as 'recorded' or 'of record' in that office"). Compare Cadwalader v. Nash, 3 Cal. 43, 14 Pac. 385, in which a map was erroneously referred to as "filed" in the office of the county recorder, but the deed was held void on the ground that the description as a whole was equally applicable to two different maps.

1. Leonard v. Osborn, 169 Cal. 157, 146 Pac. 530, 532 (holding the record of the deed was sufficient to put a purchaser on notice). Rogers v. McCartney, 3 Cal. App. 34, 84 Pac. 215; Hamm v. San Francisco, 9 Sawy. 31, 17 Fed. 119.

2. See supra, § 157.

3. McCullough v. Olds, 108 Cal. 529, 41 Pac. 420; Cadwalader v. Nash, 73 Cal. 43, 14 Pac. 385.

4. See Act 2066, Stats. 1917, p. 1653.

5. Marcone v. Dowell, 178 Cal. 396, 173 Pac. 465; Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87; Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Orena v. Newlove, 153 Cal. 136, 94 Pac.

copied into the descriptive part of the deed itself.[6] Thus, a map of a subdivision exhibiting streets and alleys which was made a part of a deed to one of the lots by reference was equivalent to a declaration that the grantee had an appurtenant right of way, independent of any dedication to the public use, in all the streets and ways leading to other lots, and every subsequent deed referring to such map for description carried such appurtenant right.[7] And a deed which excepts from its operation all land previously sold and conveyed is, in legal effect, precisely the same as if, in the description of the premises, it had given boundaries necessarily excluding the land previously sold.[8] But a map not referred to in a deed is no part of it, and hence is not admissible in evidence to control the description;[9] and when referred to in a deed is to be taken as part of it only when it can be

628; McCullough v. Olds, 108 Cal. 529, 41 Pac. 420; Masterson v. Munro, 105 Cal. 431, 45 Am. St. Rep. 57, 38 Pac. 1106; Mills v. City of Los Angeles, 90 Cal. 522, 27 Pac. 354 (where the reference to a map was made indirectly); Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. 130; Whiting v. Gardner, 80 Cal. 78; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Cleveland v. Choate, 77 Cal. 73, 18 Pac. 875; Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33; People v. Blake, 60 Cal. 497; Friedman v. Nelson, 53 Cal. 589; Hager v. Spect, 52 Cal. 579; Penry v. Richards, 52 Cal. 672 (S. C., 52 Cal. 496); Hartman v. Reed, 50 Cal. 485; Saunders v. Schmaelzle, 49 Cal. 59; Central Pac. R. R. Co. v. Beal, 47 Cal. 151; Banks v. Moreno, 39 Cal. 233; Mayo v. Mazeaux, 38 Cal. 442; Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131; Seaward v. Malotte, 15 Cal. 304; Ferris v. Coover, 10 Cal. 589; Wilhelm v. Robertson, 38 Cal. App. 219, 175 Pac. 919; Togni v. Slocomb, 12 Cal. App. 733, 108 Pac. 723; Huber v. Clarke, 1 Cal. Unrep. 475; Belknap v. Garrison, 1 Cal. Unrep. 374; Norton v. Meader, 4 Sawy. 603, Fed. Cas. No. 10,351.

6. Vejar v. Mound City L. & W. Assn., 97 Cal. 659, 32 Pac. 713; Cadwalader v. Nash, 73 Cal. 43, 14 Pac. 385; Chapman v. Polack, 70 Cal. 487, 11 Pac. 764; Powers v. Jackson, 50 Cal. 429; Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131; Vance v. Fore, 24 Cal. 436.

7. Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87. That such right may be acquired upon a representation that such streets and ways exist, independently of a map, see ESTOPPEL.

8. Stanley v. Green, 12 Cal. 148.

9. Hunt v. Barker, 27 Cal. App. 776, 151 Pac. 165.

used in aid of the description.[10] The deed and the instrument referred to, when taken together, must be as certain in respect to the description as a description contained in the deed itself.[11] And where the two are inconsistent the rules in general as to conflicting descriptions and uncertainties apply,[12] subject to the following code rule:

"When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars."[13]

The fiction involved in the principal rule is not indulged to the extent that a map incorporated in a deed by reference is required to be filed in the recorder's office as part of the deed.[14] Nor will a deed by reference to a map carry any part of what was at the date of the map an abutting highway, where the highway had been vacated and the title thereto vested in the grantor, at the time of the execution of the deed.[15]

§ 163. Operation of Rule.—A reference in a deed to a map which delineates natural or artificial objects found on the land in effect makes the deed a conveyance by monuments.[16] The map in such case is to be regarded as

10. Cleveland v. Choate, 77 Cal. 73, 18 Pac. 875.

11. Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131; Cadwalader v. Nash, 3 Cal. 43, 14 Pac. 385 (approved in Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421).

12. See supra, § 157.

13. Code Civ. Proc., § 2077, subd. 6; Wheatley v. San Pedro etc. R. Co., 169 Cal. 505, 147 Pac. 135; Orena v. Newlove, 153 Cal. 136, 94 Pac. 628; Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48.

14. Napa City v. Easterby, 76 Cal. 222, 18 Pac. 253.

15. Sanchez v. Grace M. E. Church, 114 Cal. 295, 46 Pac. 2 (holding that the ordinary rule that a transfer of land bounded by a highway passes title to the center of the highway in the absence of a different intent does not apply in such case); Civ. Code, § 1112; and see BOUNDARIES.

16. Chapman v. Polack, 70 Cal. 487, 11 Pac. 764; Vance v. Fore, 24 Cal. 435; Penry v. Richards, 52 Cal. 672 (S. C., 52 Cal. 496); Peo-

a photograph of the land,[17] and is given the same effect as if it was expressly recited and marked down in the deed itself.[18] Indeed, a verbal description of imaginary lines or streets will be disregarded as less certain and reliable than the map.[19] Where the map by reference to monuments established, or by other reference, purports to have been drawn according to a certain survey, the deed must be considered as referring to and incorporating the monuments and lines of that survey.[20] And it will be presumed, in the absence of evidence to the contrary, that the map correctly represents the survey, and the latter need not be looked to.[1] But if there is a conflict between the map and the survey, the survey controls,[2] and the reference to the map may be treated as surplusage.[3]

It is a corollary to the rule discussed in this and the preceding paragraph that instruments or records referred to in a deed for descriptive purposes are admissible in evidence for purposes of identification and construction with the deed.[4] Where the description in the deed alone is

ple v. Blake, 60 Cal. 497. Compare infra, § 177; Burke v. McCowen, 115 Cal. 481, 47 Pac. 367.

17. Chapman v. Polack, 70 Cal. 487, 11 Pac. 764; People v. Blake, 60 Cal. 497.

18. Chapman v. Polack, 70 Cal. 487, 11 Pac. 764.

19. People v. Blake, 60 Cal. 497; Mayo v. Mazeaux, 38 Cal. 442; Vance v. Fore, 24 Cal. 435.

20. Penry v. Richards, 52 Cal. 672 (S. C., 52 Cal. 496); O'Farrel v. Harney, 51 Cal. 125; Drake v. Russian River L. Co., 10 Cal. App. 654, 103 Pac. 167; Hudson v. Irwin, 50 Cal. 450.

1. Whiting v. Gardner, 80 Cal. 78, 22 Pac. 71.

2. Burke v. McCowen, 115 Cal. 481, 47 Pac. 367; Whiting v. Gardner, 80 Cal. 78, 22 Pac. 71; Cleveland v. Choate, 77 Cal. 73, 18 Pac. 87; O'Farrel v. Harney, 51 Cal. 125; Penry v. Richards, 52 Cal. 672 (S. C., 52 Cal. 496).

3. Whiting v. Gardner, 80 Cal. 78, 22 Pac. 71. See BOUNDARIES, vol. 4, p. 394 et seq.

4. Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. 130; Wilhelm v. Robertson, 38 Cal. App. 219, 175 Pac. 919; Taylor v. McConigle, 120 Cal. 123, 52 Pac. 159; Payne v. English, 79 Cal. 540, 21 Pac. 952; Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Olsen v. Rogers, 120 Cal. 225, 52 Pac. 486; McCullough v. Olds, 108 Cal. 529, 41 Pac. 420; Cadwalader v. Nash, 73 Cal. 43, 14 Pac. 385; Redd v. Murray, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132.

insufficient, such other instrument or record properly identified must be produced or in some manner established, or the description must fail.[5] And if the deed itself is properly admitted in evidence, then the instrument to which it refers is entitled to be received in evidence for the purpose of aiding the description, without any proof of its genuineness, or that there was any such person as the one purporting to execute it, or that he had any title to the land described therein.[6]

§ 164. Omissions and Clerical Errors.—A description in a deed is not void for uncertainty merely because it fails to state the state, county or city in which the property is situated, if without such statement the property can still be located and identified.[7] Where errors in description are obviously merely clerical, such as the omission of a unit of measurement,[8] or a transposition of the letters "S. B. and M.," generally recognized as meaning "San Bernardino base and meridian,"[9] or the use of an erroneous word of description,[10] such errors do not defeat the deed or render it inadmissible as evidence, particularly where the description is sufficient without regard to the defective part.[11]

§ 165. Judicial Notice of Government Surveys—Omissions—Abbreviations.—Inasmuch as a court takes judicial notice of the system of government surveys, including the

5. Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421; Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131; Cadwalader v. Nash, 73 Cal. 43, 14 Pac. 385.

6. Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

7. McCullough v. Olds, 108 Cal. 529, 41 Pac. 420; Frey v. Clifford, 44 Cal. 335.

8. Hanson v. Goldsmith, 170 Cal. 512, 150 Pac. 364; Bond v. Aickley, 168 Cal. 161, 141 Pac. 1188; Burton v. Mullenary, 147 Cal. 259, 81 Pac. 544; Hunt v. Barker, 27 Cal. App. 776, 151 Pac. 165.

9. Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153.

10. Hunt v. Barker, 27 Cal. App. 776, 151 Pac. 165; Borchard v. Eastwood, 6 Cal. Unrep. 736, 65 Pac. 1047.

11. Hanson v. Goldsmith, 170 Cal. 512, 150 Pac. 364; Borchard v. Eastwood, 6 Cal. Unrep. 736, 65 Pac. 1047.

invariable rule as to the order of reference to section, township and range,[12] and the customary abbreviations,[13] the fact that a deed fails to name the meridian from which the township and range in a certain county were numbered does not render the description invalid.[14] Even though the township and range are omitted from a description based upon a government survey the description may be aided and rendered sufficient by other means of identification contained therein.[15] Hence it has been held that the abbreviations in the description "sec. 23–16–15" are sufficiently certain, and import that section 23 lies in township 16 south and range 15 east. And the description "E. 2 of N. W. 4 of sec. S. R., 15 E." has been held sufficient.[16]

§ 166. Words "More or Less."—A description of quantity expressed in acres qualified by "more or less" or equivalent words has always been regarded indefinite and general.[17] Such words are openly indeterminative and uncertain and show that they are not of the essence of the contract, and that reliance, so far as quantity is concerned, is placed not upon them, but upon other matter of description.[18] Accordingly, such words will not control a grant of quantity otherwise clear and definite,[19] and will always give way to courses and distances and to metes

12. Stanton v. Hotchkiss, 157 Cal. 652, 108 Pac. 864.

13. Stanton v. Hotchkiss, 157 Cal. 652, 108 Pac. 864; Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153.

14. Stanton v. Hotchkiss, 157 Cal. 652, 108 Pac. 864; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594.

15. Borchard v. Eastwood, 6 Cal. Unrep. 736, 65 Pac. 1047.

16. Stanton v. Hotchkiss, 157 Cal. 652, 108 Pac. 864. See ABBREVIATIONS, vol. 1, p. 83.

17. Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

18. Danielson v. Neal, 164 Cal. 748, 130 Pac. 716; Board of Commissioners v. Younger, 29 Cal. 172.

19. Stanley v. Green, 12 Cal. 148; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; De Arguello v. Greer, 26 Cal. 615 (applied to Mexican grant); United States v. Estudillo, 1 Hoff. 204, Fed. Cas. No. 15,058 (applied to Mexican grant).

and bounds.[20] The relative values of descriptions by monuments, courses and distances, and metes and bounds,[1] matters pertaining to deficiency or surplus,[2] and the right to change or modify a conveyance as to quantity,[3] are treated elsewhere.

§ 167. Practical Construction.—The rule of practical construction[4] is frequently applied in cases of equivocal, ambiguous or insufficient descriptions.[5] But if the description is definite and certain it must be applied as found, notwithstanding a different construction may be indicated by the acts and declarations of the parties.[6] And a grant by courses and distances cannot be extended by showing that the grantor in establishing the lines measured off more than the number of feet called for by the deed.[7] Certain acts of the parties have been held to evidence their intent as to property conveyed, such as relinquishing of control and occupancy,[8] particularly where such occupancy was acquiesced in for many years;[9] the erection of fences upon the disputed boundary;[10] the declarations of the grantor at the time and subsequently to the execution of the deed;[11] and the extent to which

20. Board of Commissioners v. Younger, 29 Cal. 172. See infra, § 178; and, generally, see BOUNDARIES, vol. 4, p. 402 et seq.

1. See BOUNDARIES, vol. 4, p. 370.

2. See VENDOR AND PURCHASER.

3. See CANCELLATION, vol. 4, p. 756; REFORMATION.

4. See supra, § 130.

5. Wood v. Mandrilla, 167 Cal. 607, 140 Pac. 279; Truett v. Adams, 66 Cal. 218, 5 Pac. 96; Pico v. Coleman, 47 Cal. 65; King v. Samuel, 7 Cal. App. 55, 93 Pac. 391. And see cases cited infra.

6. Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114.

7. Hogins v. Boggs, 4 Cal. Unrep. 322, 34 Pac. 653.

8. Union Oil Co. v. Stewart, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313; Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470; Vejar v. Mound City L. etc. Assn., 97 Cal. 659, 32 Pac. 713; Hamm v. San Francisco, 9 Sawy. 31, 17 Fed. 119; California etc. Bank v. Hampton, 6 Cal. Unrep. 301, 57 Pac. 1073.

9. California etc. Bank v. Hampton, 6 Cal. Unrep. 301, 57 Pac. 1073; Hamm v. San Francisco, 9 Sawy. 31, 17 Fed. 119.

10. Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470; California etc. Bank v. Hampton, 6 Cal. Unrep. 301, 57 Pac. 1073.

11. Stanley v. Green, 12 Cal. 148.

the grantee had been accustomed to use a water right which the deed conveyed.[12] Effect will be given to an agreement of the parties establishing a boundary line where the description in the deed is uncertain.[13]

§ 168. Construction Against Grantor.—The code rule that a grant is to be interpreted in favor of the grantee, with certain exceptions,[14] is here applied to the descriptive part of the deed. The rule is more frequently invoked in support of some other well-recognized principle of construction,[15] such as that a grant carries the grantor's interest to the center of a road,[16] or stream,[17] or that one of two conflicting descriptions prevails which is least likely to be affected with mistake,[18] or that monuments control courses and distances.[19] The uncertainty in description calling for the application of the rule is generally an uncertainty as to the quantity of land embraced within the description, hence that interpretation is adopted in such cases which conveys to the grantee the greater quantity of land.[20] The principle, forming an exception to the rule that a deed by a public officer or body must be interpreted in favor of the grantor,[1] is not to be applied where one of two possible constructions of the description will defeat the deed as a conveyance, for the reason that the application of the principle presupposes an effective grant.[2] It is to be kept in mind that

12. Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107; Smith v. Williams, 6 Cal. Unrep. 193, 55 Pac. 600.

13. Sneed v. Osborn, 25 Cal. 619. And see BOUNDARIES, vol. 4, p. 427.

14. Civ. Code, § 1069; see supra, § 131.

15. Piper v. True, 36 Cal. 606.

16. Freelon v. Adrian, 161 Cal. 13, 118 Pac. 220.

17. Freeman v. Bellegarde, 108 Cal. 179, 49 Am. St. Rep. 76, 41 Pac. 289; Drake v. Russian River L. Co., 10 Cal. App. 654, 103 Pac. 167.

18. Vance v. Fore, 24 Cal. 435.

19. Orena v. Newlove, 153 Cal. 136, 94 Pac. 628.

20. Union Oil Co. v. Stewart, 158 Cal. 149, Ann. Cas. 1912A, 567; 110 Pac. 313; Hager v. Spect, 52 Cal. 579; Muller v. Boggs, 25 Cal. 175. And see cases cited supra.

1. See supra, § 131.

2. Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222.

the rule and its exceptions are subject to another established rule, namely, that any ambiguity in a description must be resolved against the party who caused the ambiguity to exist.[3]

§ 169. Parol Evidence to Remove Uncertainty.—Parol evidence is admissible to explain a phrase or term in a description which is of uncertain or indefinite meaning.[4] And where there is a conflict in the description, either in the deed alone or because of a reference to another instrument or a map which is inconsistent with and raises ambiguities in the description, parol evidence of the circumstances under which the deed was made, and of the intention of the parties, is admissible to explain the inconsistencies.[5] So where there are inconsistent calls, and it is obvious that one of them must of necessity be a false call, evidence of extrinsic attending facts is admissible to explain the error, unless it is explained by other portions of the deed.[6] Likewise, an instrument or map referred to in a deed to aid the description may be identified by parol evidence. But parol evidence is not admissible for the purpose of adding to or varying the description contained in a deed.[7] Where a deed on its face contains two

3. King v. Samuel, 7 Cal. App. 55, 93 Pac. 391,

4. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; Vejar v. Mound City L. etc. Assn., 97 Cal. 659, 32 Pac. 713; Reamer v. Nesmith, 34 Cal. 624; Crozer v. White, 9 Cal. App. 612, 100 Pac. 130. And see cases cited infra, this section; and infra, § 234.

5. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48 (applying the rule to a government patent); Cleveland v. Choate, 77 Cal. 73, 18 Pac. 875; Ferris v. Coover, 10 Cal. 589; King v. Samuel, 7 Cal. App. 55, 93 Pac. 391.

6. Reamer v. Nesmith, 34 Cal. 624; Ferris v. Coover, 10 Cal. 589; Huber v. Clarke, 1 Cal. Unrep. 475.

7. Castro v. Tennent, 44 Cal. 253; Altschul v. San Francisco etc. Homestead Assn., 43 Cal. 171; Donahue v. McNulty, 24 Cal. 411, 85 Am. Dec. 78; Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512.

inconsistent descriptions, either of which would fit a different piece of property from that described by the other,[8] or the sufficiency of description depends upon a map to which reference is made and the reference is equally applicable to two different maps,[9] a patent ambiguity is disclosed which parol evidence as a rule is not admissible to remove.

Methods of Description.

§ 170. General Description.—Descriptions of land, general in character, such as "all land and real estate" of the grantor "wherever the same may be situated,"[10] or "the land owned by the grantor" in a certain county,[11] or all the grantor's "right, title and interest" in a certain city "consisting of town lots," etc.,[12] are good and pass the grantor's interest in all his real property coming within the description, saving such property as may be expressly excepted from the operation of the deed.[13] So a deed purporting to convey the grantor's interest in the estate of a deceased person, being "the property of which he died seised or possessed," contains a sufficient description.[14] But such general descriptions do not carry merely personal and incidental rights, such as a widow's right to a homestead under the statute,[15] or the grantor's right to an allowance during administration from the

8. Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176; Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33.

9. Cadwalader v. Nash, 73 Cal. 43, 14 Pac. 385.

10. Pettigrew v. Dobbelaar, 63 Cal. 396 (such a deed executed in Illinois passed title to land in California); In re King's Estate (Cal.), 36 Pac. 806 (implied); In re Moore's Estate, 57 Cal. 437 (implied).

11. Borchard v. Eastwood, 6 Cal. Unrep. 736, 65 Pac. 1047; Staples v. May, 3 Cal. Unrep. 250, 23 Pac. 710.

12. Frey v. Clifford, 44 Cal. 335.

13. Borchard v. Eastwood, 6 Cal. Unrep. 736, 65 Pac. 1047.

14. De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637; In re Moore's Estate, 57 Cal. 437.

15. In re Moore's Estate, 57 Cal. 437; In re King's Estate (Cal.), 36 Pac. 806.

estate conveyed.[16] And property received by devise has been held not to be within a description which described the property as "inherited" by the grantor.[17]

§ 171. By Name.—It is elementary that a grant of real property having a descriptive name may describe it by such name.[18] Likewise land may be excepted from a grant by its general name.[19] And extrinsic or parol evidence is admissible to aid the description and locate the land.[20] If it is a name by which the land is known and designated, and the boundaries of the land known by that name are notorious and well defined so that the land can be identified, the description is sufficient, and the grant carries title to the whole tract.[1] Thus, a deed conveying "Watson ditch" in a certain county sufficiently described the property where it appeared there was but one ditch in the county generally known and spoken of by that name.[2] So, a conveyance of a confirmed but unsegregated government grant by its known and proper name was held sufficient where the name could have no application to any land but that upon which the floating grant might settle upon its final survey.[3] A description by name may aid other elements of description in the deed,[4] or it may be supplemented by a more particular de-

16. De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637.

17. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

18. Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Civ. Code, § 1092 (quoted in full, supra, § 3).

19. Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

20. Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Stanley v. Green, 12 Cal. 148. See supra, § 169, and infra, § 180.

1. Vejar v. Mound City L. etc. Assn., 97 Cal. 659, 32 Pac. 713; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Phelan v. Poyoreno, 74 Cal. 448, 13 Pac. 681; Truett v. Adams, 66 Cal. 218, 5 Pac. 96; Hager v. Spect, 52 Cal. 579; Spect v. Gregg, 51 Cal. 198; Banks v. Moreno, 39 Cal. 233; Muller v. Boggs, 25 Cal. 175. See, also, cases cited infra.

2. Murray v. Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586.

3. Piper v. True, 36 Cal. 606.

4. Stanley v. Green, 12 Cal. 148; Borchard v. Eastwood, 6 Cal. Unrep. 736, 65 Pac. 1047.

scription, such as courses and distances,[5] or metes and bounds.[6] And where the particular description is uncertain, defective or erroneous it will be controlled by the general name.[7]

§ 172. Lot and Subdivision.—When a tract of land has been subdivided into blocks or lots, and a map made on which such blocks or lots are designated by numbers, a description of such subdivisions in a deed by the numbers so designated is sufficient, provided the map can be produced and identified.[8] Particularly is this true if the map, or the survey upon which it is based, is referred to and identified on the face of the deed.[9] Such a deed is not void for uncertainty as matter of law,[10] and parol evidence is admissible to identify the land by the description given.[11] As in case of description by name,[12] a designation of a lot by number and subdivision ordinarily is superior to and controls a description by metes and bounds or by courses and distances, where such descrip-

5. Marcone v. Dowell, 178 Cal. 396, 13 Pac. 465; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Haley v. Amestoy, 44 Cal. 132.

6. Aguirre v. Alexander, 58 Cal. 21.

7. Marcone v. Dowell, 178 Cal. 396, 173 Pac. 465; Murray v. Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Aguirre v. Alexander, 58 Cal. 21; Haley v. Amestoy, 44 Cal. 132; Reed v. Spicer, 27 Cal. 57.

8. Fitzimons v. Atherton, 162 Cal. 630, 124 Pac. 250; Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176; McCullough v. Olds, 108 Cal. 529, 41 Pac. 420 (stating the rule).

9. Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38, 41 Pac. 330; Pettigrew v. Dobbelaar, 63 Cal. 396; De Levillain v. Evans, 39 Cal. 120; Wilhelm v. Robertson, 38 Cal. App. 219, 175 Pac. 919; Rogers v. McCartney, 3 Cal. App. 34, 84 Pac. 215. See, also, cases cited infra, this section, and see supra, §§ 160–163.

10. Thompson v. Thompson, 52 Cal. 154; Redd v. Murray, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47.

11. Fitzimons v. Atherton, 162 Cal. 630, 124 Pac. 250; Colton Land & W. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; Redd v. Murray, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Penry v. Richards, 52 Cal. 496; Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131; Belknap v. Garrison, 1 Cal. Unrep, 374.

12. See supra, § 171.

tions conflict.[13] But where a lot is described by number and also by definite boundaries or measurements, and the designation by number is indefinite,[14] or intended to be subordinate to the more particular description,[15] the latter will control. A conveyance by lots and blocks as delineated on a map by numbers or letters is not a conveyance by metes and bounds.[16] Upon the same general principle, if a designation by lot or block number is a false reference it may be disregarded.[17] And where a lot was designated by number as upon a certain map but it does not appear on the map by that number, it was held that the reference may be disregarded and the deed given effect, where it appeared the lot was properly known by such number;[18] and similarly where the reference to the map was a false call.[19]

§ 173. Government and Private Surveys.—Land may be conveyed by reference to government sections and their subdivisions as defined by lines established by government surveys.[20] Where such divisions are described by proper designation, as, for instance, the name of the township or of its subdivision, the line of survey made by the United States, and the monuments then placed, are considered as

13. Masterson v. Munro, 105 Cal. 431, 45 Am. St. Rep. 57, 38 Pac. 1106.

14. Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176.

15. Friedman v. Nelson, 53 Cal. 589.

16. Freelon v. Adrian, 161 Cal. 13, 118 Pac. 220.

17. Los Angeles etc. Land Co. v. Marr, 178 Cal. 243, 173 Pac. 83.

18. Belknap v. Byington, 1 Cal. Unrep. 374. Compare, supra, § 157.

19. Leonard v. Osburn, 169 Cal. 157, 146 Pac. 530, 532.

A presumption of uniformity in the numbering of lots in the blocks of a subdivision to aid a description may properly be indulged under some circumstances. Thus, where a deed conveyed the south half of sixteen blocks, excepting from various blocks certain lots bearing numbers from 5 to 8, it was presumed that a lot designated as lot 5 of a specified block was situated in the south half of the block and was included in the conveyance. Sanchez v. Neary, 41 Cal. 485.

20. Helm v. Wilson, 76 Cal. 476, 18 Pac. 604; Cox v. Hayes, 64 Cal. 32, 27 Pac. 85; California Real Estate Co. v. Walkup, 27 Cal. App. 441, 150 Pac. 385. See cases cited infra, and see, also, supra, § 165.

referred to on the face of the deed.[1] It has been held that a deed which describes the east "half" of a fractional quarter-section, and makes no mention of acreage, conveys the east half in quantity where the division according to the rules of government surveys divides the quarter into halves of equal acreage.[2] But a description of land in a specified county and state which read "the west half of the southwest quarter of section 12, No. 31, containing 70 acres, more or less," while prima facie insufficient, was held to be sufficient upon parol proof that its location could be determined by reference to the county records.[3] There is no objection to a deed which describes a fractional part not deemed a legal subdivision, as a "south one-fourth." While such a description is not ordinarily used by the government in patents of land, there is no reason why it is not sufficient in conveyances between private parties, inasmuch as the land so described may be ascertained.[4] The fact that land is erroneously designated as being in a certain subdivision of a government section is not controlling, if it can be identified by other parts of the description, such as a reference to a monument.[5] Here also the general rule that clear words of description are not modified by a recital of quantity applies, and a conveyance of "all" of a certain section of land is not qualified by a statement of the number of acres it contains.[6] The effect in general of a grant of a specific fractional part, or of a specific quantity in a par-

1. Powers v. Jackson, 50 Cal. 429. Where owners of land, such as a Mexican grant, have adopted the government method of surveying and subdividing their land, and have caused a map to be made showing such subdivisions, a description in accordance with the survey so made is sufficient. Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716.

2. Wood v. Mandrilla, 167 Cal. 607, 140 Pac. 279; McCartney v. Dennison, 101 Cal. 252, 35 Pac. 766.

3. Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512.

4. McCartney v. Dennison, 101 Cal. 252, 35 Pac. 766.

5. Helm v. Wilson, 76 Cal. 476, 18 Pac. 604.

6. Cecil v. Gray, 170 Cal. 137, 148 Pac. 935.

ticular part, of a tract of land is considered in another place in this article.[7]

§ 174. Aider by Ownership and Use.—The identity of land intended to be conveyed may be rendered certain by a statement of ownership of such land,[8] or of adjoining land.[9] Thus, a deed for "one-half of my lot" in a certain town is sufficiently certain, where it is shown that the grantor owned but one lot in the place;[10] but in the absence of such proof the deed is void.[11] And a deed of "all my right, title and interest" in lands in a certain city "consisting of town lots and buildings thereon" passes the grantor's interest in his real property in that city.[12] But a deed purporting to convey city lots without averring ownership, or anything to distinguish the lots from the bulk of the city property, has been held void because of a patent ambiguity.[13] Where there are two conflicting descriptions, and the grantor owns lands answering to one and not the other, the description which applies to the land which he owns will be adopted as the true one and the other discarded as false.[14] Ownership will control courses and distances where such is the evident intention of the parties.[15] And land conveyed may be definitely described by reference to the known occupation of the grantor or another.[16] Likewise, a description of property by its use and occupation has been held to prevail over a description by courses and distances, as being more definite and certain than the latter description.[17]

7. See infra, §§ 181–185.

8. Crozer v. White, 9 Cal. App. 612, 100 Pac. 130. And see cases cited infra.

9. See cases cited infra, § 176.

10. Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

11. Stafford v. Lick, 10 Cal. 12.

12. Frey v. Clifford, 44 Cal. 335. Compare, supra, § 170.

13. Mesick v. Sunderland, 6 Cal. 297.

14. Piper v. True, 36 Cal. 606 (arguendo).

15. Powers v. Bank of Oroville, 136 Cal. 486, 69 Pac. 151.

16. Banks v. Moreno, 39 Cal. 233 (dictum); approved in Togni v. Slocomb, 12 Cal. App. 733, 108 Pac. 723.

17. Wade v. Deray, 50 Cal. 376.

§ 175. Calls for Course and Distance.—Discrepancies between calls for courses and distances and other calls are fully treated in another article,[18] as are also the rules governing the use of particular words and phrases in conveyancing.[19] It is sufficient here to say that all authorities on the subject assign courses and distances the lowest scale in evidence as being the least reliable of matters of description,[20] and hence they are controlled by visible or ascertained boundaries and by permanent monuments,[1] and are subordinate to description by number of block.[2] Mistakes in courses and distances will be harmonized or disregarded in accordance with the rule that effect must be given to the intention of the parties.[3]

§ 176. Calls for Adjoinders.—Adjoining lands as constituting boundaries, and as constituting monuments controlling courses and distances,[4] are treated in another article.[5] Their consideration here is limited to their aspects relative to intent and certainty in description. A call for the boundary of adjoining land must be construed as a call for its actual boundary as defined by its terminal monuments.[6] But a call for adjoining lands of a certain person must, in the absence of anything to indicate a contrary intent, be understood as a call for lands to which such person held title,[7] and such a call where inconsistent may control a designation of the land by its

18. See BOUNDARIES, vol. 4, p. 399 et seq.

19. See BOUNDARIES, vol. 4, p. 375 et seq.

20. Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114.

1. Code Civ. Proc., § 2077, subds. 2, 3. See infra, § 177.

2. Masterson v. Munro, 105 Cal. 431, 45 Am. St. Rep. 57, 38 Pac. 1106.

3. Farnham v. Huston, 39 Cal. App. 687, 179 Pac. 701. See supra, § 157.

4. Oreno v. Newlove, 153 Cal. 136, 94 Pac. 628; Powers v. Bank of Oroville, 136 Cal. 486, 69 Pac. 151.

5. See BOUNDARIES, vol. 4, pp. 428, 430.

6. Union Oil Co. v. Stewart, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313; Orena v. Newlove, 153 Cal. 136, 94 Pac. 628.

7. Umbarger v. Cheboya, 49 Cal. 525.

known name.[8] But where the name of the owner given was erroneous the description was not for that reason indefinite and uncertain when it appeared that the grantor had always understood the name given to be that of the true owner.[9] A description so uncertain in the designation of lands by which it is bounded that it cannot be rendered certain by extrinsic evidence is void.[10] But it has been held that a description is not defective which calls for a lot bounded on three sides by streets according to a designated plat, and on the fourth side by unsurveyed lands.[11]

§ 177. Calls for Monuments on Visible Boundaries.—While it has been said that monuments and natural objects called for in a deed cannot with any propriety be said to be part of the deed,[12] it has also been said that to permit courses and distances to be controlled by monuments by whomsoever placed, and other than those of the survey referred to in the deed, is to permit the deed to be contradicted when such monuments do not agree with the termini of the lines described in the deed.[13] And a description is not to be deemed insufficient because it describes a parcel of land with reference to a corner or boundary to be subsequently established, if it can be finally identified.[14] Descriptions by visible boundaries and by monuments, natural or artificial, are favored, and other things being equal, control quantity;[15] and following

8. Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313, Ann. Cas. 1912A, 567, 110 Pac. 313.

9. McKeon v. Millard, 47 Cal. 581.

10. Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543.

11. Garwood v. Hastings, 38 Cal. 216.

12. California Iron Construction Co. v. Bradley, 138 Cal. 328, 71 Pac. 346.

13. Powers v. Jackson, 50 Cal. 429; Romie v. Casanova, 45 Cal. 131; Chapman v. Excelsior Canal Co., 17 Cal. 231.

14. Altschul v. San Francisco etc., Homestead Assn., 43 Cal. 171; Maxey v. Thurman, 50 Cal. 321.

15. Union Oil Co. v. Stewart, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313; Orena v. Newlove, 153 Cal. 136, 94 Pac. 628; Miller v. Grunsky, 141 Cal. 441, 75 Pac.

a general rule of boundaries,[16] also control descriptions by courses and distances,[17] and by metes and bounds;[18] and without regard to whether such monuments were seen by the parties to the deed or not.[19] This rule is adopted because it is more likely to lead to the discovery of the intent of the parties.[20] But it is not inflexible and yields wherever, taking all of the particulars of the deed together, it would be absurd to apply it.[1] But distances and quantity are nevertheless entitled to some weight in getting at the intention of the parties where there is a latent ambiguity as to what monument was intended.[2] The subject of the control of monuments generally over surveys, field-notes and maps is fully considered elsewhere in this work.[3]

§ 178. Calls for Quantity.—It is a rule that where there is not sufficient certainty and demonstration of the land granted, expressed in other terms of its description, a statement of the acreage is essential.[4] And where there

48; Code Civ. Proc., § 2077. See BOUNDARIES, vol. 4, p. 397.

16. See BOUNDARIES, vol. 4, p. 398 et seq.

17. De Watson v. San Pedro etc. R. Co., 169 Cal. 520, 147 Pac. 140; Penry v. Richards, 52 Cal. 672 (S. C., 52 Cal. 496); Hunt v. Barker, 27 Cal. App. 776, 151 Pac. 165; Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Walsh v. Hill, 38 Cal. 481; De Arguello v. Greer, 26 Cal. 615; Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114; Meeker v. Simmons, 10 Cal. App. 250, 101 Pac. 683; Powers v. Jackson, 50 Cal. 429; California etc. Bank v. Hampton, 6 Cal. Unrep. 301, 57 Pac. 1073.

18. King v. Samuel, 7 Cal. App. 55, 93 Pac. 391.

19. Anderson v. Richardson, 92 Cal. 623, 28 Pac. 679; Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114.

20. Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114.

Descriptions of land which designate it as "lying south" or "at" or "on," with reference to a certain object or point, are so construed as to give effect to the apparent intention of the parties. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878; Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176.

1. White v. Luning, 93 U. S. 514, 23 L. Ed. 938.

2. Doe v. Vallejo, 29 Cal. 385.

3. See BOUNDARIES, vol. 4, p. 401 et seq.

4. Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38, 41 Pac. 330; Hall v. Shotwell, 66 Cal. 379, 5 Pac. 683.

is doubt as to the true description, quantity may be properly considered,[5] and often becomes a controlling consideration.[6] But quantity is not to be viewed as a factor in establishing boundaries unless the more particular description given is indefinite and uncertain.[7] Clear words of description are not modified by a recital of quantity.[8] And a clear description by metes and bounds conveys all the land embraced within such boundaries, regardless of the acreage specified.[9] This was also the rule at common law.[10]

§ 179. Identification of Ascertained Boundaries and Monuments.—In conformity with the general rules of certainty in description,[11] a deed is not void if, so far as can be determined from the description itself, the points named as boundaries may be well-known boundaries easily found.[12] And it will be presumed, in the absence of evidence to the contrary, that monuments referred to in a description are known and ascertainable.[13] Oral testimony is admissible for the purpose of pointing out the location of the monuments, agreed upon and named in the conveyance, in order to identify the land conveyed;[14]

5. Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38, 41 Pac. 330; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

6. Winans v. Cheney, 55 Cal. 567.

7. Wheatley v. San Pedro etc. R. Co., 169 Cal. 505, 147 Pac. 135. See BOUNDARIES, vol. 4, p. 403.

8. Cecil v. Gray, 170 Cal 137, 148 Pac. 935; Tappendorf v. Downing, 76 Cal. 169, 18 Pac. 247.

9. Code Civ. Proc., § 2077, subd. 3; Home & Farm Co. v. Freitas, 153 Cal. 680, 96 Pac. 308; Winans v. Cheney, 55 Cal. 567; De Arguello v. Greer, 26 Cal. 615; Stanley v. Green, 12 Cal. 148; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764. See, also, supra, § 177.

10. Tobin v. Walkinshaw, 1 McAll. 151, Fed. Cas. No. 14,069. As to construction of words "more or less" in calls for quantity, see supra, § 166. See, generally, BOUNDARIES, vol. 4, p. 403.

11. See supra, § 157.

12. Meyers v. Farquharson, 46 Cal. 190.

13. Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361.

14. Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114; Altschul v. San Francisco etc. Homestead Assn., 43 Cal. 171; Colton v. Seavey, 22 Cal. 496; Penry v. Richards, 52

and the fact that monuments have disappeared,[15] or have changed their position,[16] does not avoid the deed if the points originally established can be identified by extrinsic evidence.[17] In thus applying the description of a deed to the monuments referred to therein, it is the endeavor of the court to ascertain the intention of the parties.[18]

§ 180. Extrinsic Evidence in General.—Extrinsic evidence is always admissible to explain the calls of a deed so as to apply them to the subject matter, and give effect to the deed.[19] And a deed is not void for uncertainty if it contains a description which, by appropriate evidence of the facts therein referred to, might be shown to apply to specific property.[20] Thus, a description is made sufficient by

Cal. 672 (S. C., 52 Cal. 496); Spreckels v. Ord, 72 Cal. 86, 13 Pac. 158; Anderson v. Richardson, 92 Cal. 623, 28 Pac. 679; Stinchfield v. Gillis, 107 Cal. 84, 40 Pac. 98.

15. Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. 130; Hunt v. Barker, 27 Cal. App. 776, 151 Pac. 165.

16. Hunt v. Barker, 27 Cal. App. 776, 151 Pac. 165.

17. Hunt v. Barker, 27 Cal. App. 776, 151 Pac. 165.

18. Beall v. Weir, 11 Cal. App. 364, 105 Pac. 133.

19. Fitzimons v. Atherton, 162 Cal. 630, 124 Pac. 250; Burke v. McCowen, 115 Cal. 481, 47 Pac. 367; Redd v. Murray, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. 130; Cleveland v. Choate, 77 Cal. 73, 18 Pac. 875; Reamer v. Nesmith, 34 Cal. 624; Stanley v. Green, 12 Cal. 148.

20. Leonard v. Osborn, 169 Cal. 157, 146 Pac. 530; Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Colton Land & W. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; Redd v. Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. 130. (applying Civ. Code, § 3538); Stanley v. Green, 12 Cal. 148; Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383; Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512; Crozer v. White, 9 Cal. App. 612, 100 Pac. 130.

A deed is void for uncertainty only where it is apparent from its face that the intention of the grantor as to the property conveyed is so uncertain that it is incapable of being made certain by resort to extraneous facts. County of Los Angeles v. Hannon, 159 Cal. 37, Ann. Cas. 1912B, 1065, 112 Pac. 878. Where an uncertainty exists, the grantor's intention may be sought for by a consideration of all the facts surrounding the parties when the instrument was made. County

parol proof that the location can be readily determined by reference to the county records,[1] or to other instruments or maps,[2] or by evidence of a survey referred to and identified therein.[3] But if the lands are capable of being identified by a construction of the deeds themselves evidence aliunde will not be resorted to.[4] Whether or not such evidence is sufficient to show that the land can be identified with reasonable certainty is a question of fact.[5]

Fractional, Unlocated and Undivided Portions.

§ 181. Specific Fractional Designation.—There is no objection to a description in a deed which designates a fractional part of a tract of land as, for example, the "south one-half,"[6] or the "south ten acres,"[7] at least where, in such cases, the sides of the tract are parallel.[8] And a description is sufficient which designates a certain number of feet of a parcel of land, or describes a part by specific dimensions and gives it definite location by relation to a corner of the tract or otherwise.[9] It also seems that a

of Los Angeles v. Hannon, 159 Cal. 37, 112 Pac. 878; Orena v. Newlove, 153 Cal. 136, 94 Pac. 628.

1. Fitzimons v. Atherton, 162 Cal. 630, 124 Pac. 250; Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512.

2. Redd v. Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Penry v. Richards, 52 Cal. 672 (S. C., 52 Cal. 496).

3. Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. 130; Hudson v. Irwin, 50 Cal. 450; Drake v. Russian River L. Co., 10 Cal. App. 654, 103 Pac. 167.

4. Pulliam v. Bennett, 55 Cal. 368.

5. Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512; Valentine v. Jansen, 1 Cal. Unrep. 525.

6. Earl v. Dutour, 181 Cal. 58, 6 A. L. R. 1163, 183 Pac. 438; Wood v. Mandrilla, 167 Cal. 607, 140 Pac. 279; McCartney v. Dennison, 101 Cal. 252, 35 Pac. 766; Thompson v. McKenna, 22 Cal. App. 129, 133 Pac. 512.

7. McCartney v. Dennison, 101 Cal. 252, 35 Pac. 766; Fraser v. Ott, 95 Cal. 661, 30 Pac. 793; Cox v. Hayes, 64 Cal. 32, 27 Pac. 785.

8. McCartney v. Dennison, 101 Cal. 252, 35 Pac. 766.

9. Hall v. Shotwell, 66 Cal. 379, 5 Pac. 683; De Levillain v. Evans, 39 Cal. 120; California Real Estate Co. v. Walkup, 27 Cal. App. 441, 150 Pac. 385.

definite part of a tract may be described as that which is appurtenant to a certain building or structure thereon, in which case extrinsic evidence is admissible to show what land is embraced within that term.[10]

While the general rule of boundaries that a transfer of land bounded by a highway passes title to the center of the highway, unless a different intent appears from the grant,[11] applies to a conveyance of a parcel of land by lot number and subdivision,[12] a conveyance of a specific fractional part of a lot or parcel of land, whether in fractional terms or in feet or acreage, has been construed as conveying such fractional part exclusive of any part of an abutting highway.[13] In such case it is presumed, in the absence of any circumstances indicating a contrary intent, that such a grant conveys only the given fractional part or quantity of that portion of the lot or parcel of land which is set apart for private use and occupancy. And such presumption is not rebutted by evidence, furnished by a map referred to in the deed, that in plotting the tract containing such lot or parcel of land it was intended the lot owners should take title to the center of the streets or avenues.[14]

§ 182. Unlocated Portion—Right of Selection.—A conveyance of a definite number of acres, or any other definite quantity of land, parcel of a larger tract sufficiently described, but without locating the land thus conveyed, is

10. Crozer v. White, 9 Cal. App. 612, 100 Pac. 130 (but holding the term "appurtenant" in this case embraced the whole tract). Compare supra, § 154.

11. See BOUNDARIES, vol. 4, p. 379.

12. Freelon v. Adrian, 161 Cal. 13, 118 Pac. 220; Sanchez v. Grace M. E. Church, 114 Cal. 295, 46 Pac. 2.

13. Earl v. Dutour, 181 Cal. 58, 6 A. L. R. 1163, 183 Pac. 438, (For a criticism of the holding in this case, see 8 Cal. Law Rev. 108); Fraser v. Ott, 95 Cal. 661, 30 Pac. 793 (defining a "block" as a square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots).

14. Earl v. Dutour, 181 Cal. 58, 6 A. L. R. 1163, 183 Pac. 438. For effect of abandonment before execution of deed, of abutting highway shown on map referred to, see supra, § 162.

to be construed as conveying an undivided and proportionate interest in the larger tract, provided the deed does not purport specifically to describe the smaller tract so conveyed and fail to do so with reasonable certainty.[15] Such construction conforms to the manifest intention of the parties.[16] And the construction is the same, whether the interest conveyed is measured by acres,[17] by square miles,[18] or by fractional subdivision, such as a half, a quarter, or the like.[19] So a grantor may reserve from a tract of land conveyed a certain unlocated quantity and part thereof.[20] In such cases the grantee does not have the right of location as against the will of his grantor, unless such right is conferred upon him by some stipulation in the deed.[1] But where it is stipulated that a grant is to be definitely located by the grantee within a reasonable time, and he fails so to do, the grant is none the less absolute, and if the parties cannot agree as to the location, a court of equity upon proper application has power to locate the grant.[2] Likewise, a grantor may reserve a definite unlocated quantity in the tract of land conveyed, with the right of selection.[3]

§ 183. Distinguished from Defective Description of Located Portion.—On the other hand, a deed which purports

15. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Wallace v. Miller, 52 Cal. 655; Grogan v. Vache, 45 Cal. 610; Lawrence v. Ballou, 37 Cal. 518; Schenk v. Evoy, 24 Cal. 104; Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

16. Grogan v. Vache, 45 Cal. 610.

17. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Wallace v. Miller, 52 Cal. 655; Grogan v. Vache, 45 Cal. 610; Lawrence v. Ballou, 37 Cal. 518; Schenk v. Evoy, 24 Cal. 104.

18. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

19. Grogan v. Vache, 45 Cal. 610; Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

20. Morenhout v. Brown, 1 Cal. Unrep. 139.

1. Schenk v. Evoy, 24 Cal. 104.

2. Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254 (applied to a grant of a right of way).

3. Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Salmon v. Wilson, 41 Cal. 595.

to describe a specific tract of land, mentioned as parcel of a larger tract, but which fails to describe the tract intended to be conveyed in such a manner that it can be located, will not operate, by reason of such insufficient description of the specific tract, as a conveyance of an undivided interest in the larger tract.[4] Such a deed is a defective conveyance of a given tract of land; and there is no rule for the construction of deeds which will work that result.[5] A deed is to be deemed a conveyance of a specific parcel of land, and will not fall within the above rule, when the description starts with a known and recognized monument on the ground, and then attempts to give the other calls, which are too indefinite to inclose any particular tract of land. This is especially true where the land attempted to be granted by the defective description falls entirely outside of the tract in which it is supposed to lie. and of which it is supposed to be a part.[6]

§ 184. Description of Undivided Interest.—Equal undivided fractional interests in land are as a rule exact equivalents of and indistinguishable from each other.[7] But such an interest may be identified and described in a conveyance as a particular as distinguished from a general undivided interest. Thus, it has been held that a description, which described an undivided interest as one theretofore conveyed, was ineffective where it appeared such interest had been extinguished by the adverse possession of the grantor.[8] And where a deed purported to convey a general undivided interest, parol evidence was held inadmissible to show an intention to convey a particular undivided interest, as being an attempt to show that the

4. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Grogan v. Vache, 45 Cal. 610.

5. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Grogan v. Vache, 45 Cal. 610.

6. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

7. Hartman v. Reed, 50 Cal. 485; Reed v. Union Copper Min. Co., 1 Cal. Unrep. 587.

8. Hartman v. Reed, 50 Cal. 485.

interest was not absolute but qualified.[9] A conveyance of an undivided half interest in a tract of land in which the grantor had merely an undivided quarter interest is to be construed as passing the whole and not one-half of such quarter interest.[10] Inconsistent descriptions involving fractional undivided interests are considered in another paragraph.[11]

§ 185. Interest in Unlocated Quantity.—A distinction is made between a conveyance of a definite number of acres, unlocated, out of a tract of land, and a conveyance of the interest of the grantor in a specified number of acres in the tract. Thus, where a grantor owns a certain number of acres, unlocated, in a tract, a deed purporting to convey all of the grantor's interest in and to a specified number of acres of the tract, undivided, or in and to a specified number of acres "to be taken out of his interest which he now holds," is not to be construed as granting such specified number of acres, undivided, or an interest equal to that quantity, but only the grantor's interest in that number of acres in the tract. And the fact that it is stipulated in the deed that the interest granted shall be taken by the grantee from a specified part of the tract does not affect the rule.[12] Upon the same principle, where one granted his right, title and interest in a tract of land in which he held an undivided interest, and excepted a specified part, such exception was held to be the equivalent of the grantor's interest in the part excepted and not the equivalent of the whole part.[13]

9. Reed v. Union Copper Min. Co., 1 Cal. Unrep. 587. Compare supra, § 47.

10. Jordan v. Fay, 98 Cal. 264, 33 Pac. 95.

11. See supra, § 159.

12. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

13. McBrown v. Dalton, 70 Cal. 89, 11 Pac. 583.

XI. EXCEPTIONS AND RESERVATIONS.

§ 186. Distinctions Generally.—A "reservation" in its technical sense[14] is deemed equivalent to an express grant by the grantee to the grantor,[15] but the effect of an "exception" is to leave the title of the thing excepted in the grantor.[16] To constitute a provision a reservation or exception, strictly speaking, it must be contained in a conveyance or agreement for a conveyance.[17] A provision may in effect constitute a reservation of an easement, though it is stated in words of covenant;[18] and, conversely, a provision in terms of reservation may constitute a mere personal agreement.[19] Whether a provision should be deemed a covenant or reservation is not material where its effect in either case would be the same.[20] A grantor may by words of reservation in a deed acquire some right, as a right of way, over property of the grantee.[1] It seems, however, that this is not strictly by way of reservation, but by way of condition or implied covenant.[2] A reservation may be made to depend upon a condition.[3]

14. See infra, § 187.

15. Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905; Painter v. Pasadena L. & W. Co., 91 Cal. 74, 27 Pac. 539; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

16. Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Sears v. Ackerman, 138 Cal. 583, 71 Pac. 171; Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Morenhout v. Brown, 1 Cal. Unrep. 139.

17. Sutter Butte C. Co. v. Richvale L. Co., 40 Cal. App. 451, 181 Pac. 98.

18. Weller v. Brown, 25 Cal. App. 216, 143 Pac. 251 (decision on first appeal reported in 160 Cal. 515, 117 Pac. 517).

19. Peterson v. McDonald, 13 Cal. App. 644, 110 Pac. 465.

A reservation of a water right with a right to connect with the flume or pipe of the grantees for purpose of delivery does not imply a covenant on the part of the latter to construct such pipe or flume. Duckworth v. Watsonville Water etc. Co., 170 Cal. 425, 150 Pac. 58.

20. Weeks v. Link, 137 Cal. 502, 70 Pac. 548.

1. Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905.

2. 8 Ruling Case Law, 1089.

3. Smith v. Stearns Ranchos Co., 132 Cal. 178, 64 Pac. 261 (implied).

§ 187. Distinction Between Reservation and Exception. In a strict technical sense a "reservation" in a deed is not synonymous with "exception,"[4] the difference being well defined.[5] A reservation creates some right or privilege for the benefit of the grantor in the land described as granted, and withholds it from the operation of the grant,[6] while an exception withdraws a part of the thing described as granted, and which would pass but for the excepting clause.[7] By a reservation the grantor reserves to himself something which did not exist as an independent right before the grant, but which is thereby newly created out of the lands and tenements conveyed,[8] such as rents and easements,[9] and rights in the nature of profits a prendre.[10] But an exception is always some part or parcel of a thing granted and of a thing in being.[11] The effect in respect to a thing excepted is as though it had never been included in the deed.[12] Thus, a clause in a deed retaining to the grantor from the land granted an easement for street purposes,[13] or the right to enter upon the land and cut and remove the timber growing thereon,[14]

4. Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816.

5. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271; Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889.

6. Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809.

7. Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Lummer v. Unruh, 25 Cal. App. 97, 142 Pac. 914; Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809; Smith v. Williams, 6 Cal. Unrep. 193, 55 Pac. 600 (per Temple, J.).

8. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889.

9. Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905; Smith v. Williams, 6 Cal. Unrep. 192, 55 Pac. 600.

10. Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Painter v. Pasadena Land & W. Co., 91 Cal. 74, 27 Pac. 539 (implied). See, generally, EASEMENTS; LANDLORD AND TENANT; MINES AND MINERALS; WATERS.

11. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889.

12. Lummer v. Unruh, 25 Cal. App. 97, 142 Pac. 914.

13. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271; Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809.

14. Van Slyke v. Arrowhead etc. Co., 155 Cal. 675, 102 Pac. 816.

would be technically a reservation. On the other hand, the retention of a certain number of acres or designated part of the land granted,[15] or of the timber growing on the land,[16] would be technically an exception.

§ 188. Intention as Controlling Terms Used.—While the distinction between a reservation and exception is clearly marked,[17] it is said to be so slight and shadowy that in common parlance the terms are used interchangeably, and the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used.[18] Whether, therefore, a particular provision is an exception or reservation depends upon the nature and legal effect of the provision itself and the facts it represents and not upon the use of one or other of these terms.[19] And the court should construe the whole conveyance for the purpose of ascertaining the real intention of the parties and give it effect accordingly, regardless of the terms "reserving" or "excepting."[20] Accordingly, what the parties have designated as a "reservation," though under the established rules of construction would be inoperative as a reservation, may be treated and given effect as an exception. This is in line with the recognized policy of the law

15. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889; Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Painter v. Pasadena Land & W. Co., 91 Cal. 74, 27 Pac. 539; Morenhout v. Brown, 1 Cal. Unrep. 139.

16. Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171.

17. See supra, § 187.

18. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889; Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Painter v. Pasadena Land & W. Co., 91 Cal. 74, 27 Pac. 539; Hawes v. Stebbins, 49 Cal. 369; Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal. App. 451, 181 Pac. 98; Seligman v. Carr, 8 Cal. App. 572, 97 Pac. 324.

19. Hawes v. Stebbins, 49 Cal. 369; Seligman v. Carr, 8 Cal. App. 572, 97 Pac. 324.

20. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271.

to give effect, as far as possible, to the intention and purpose of the parties to an instrument.[1]

§ 189. Rules of Construction Generally.—The rules of construction applicable to grants, and particularly to descriptions,[2] apply also, as a general rule, to an exception therefrom.[3] Thus, a tract of land may be excepted by the name under which it is known, from a larger tract conveyed;[4] or by reference to a description in another deed;[5] or by designating it as that "previously sold and conveyed";[6] and an exception may be made of an undivided fractional part of the land granted.[7] But when an exception has reference to land which is not part of the land described in the grant it is meaningless.[8] The purpose in construing an exception or reservation is to arrive at the intention of the parties,[9] but the court should not presume an intention not indicated by the language used.[10] Hence, language purporting to grant an easement cannot be construed as a reservation of an easement.[11] If words used in a reservation have any certain, precise and generally accepted meaning, they speak for themselves, but if they are of ambiguous import the court will look to the circumstances surrounding the parties at the date of the transaction to ascertain their intent.[12] It is a general rule that a party claiming under a deed containing an exception must, to establish his title, show that the land claimed by him is not within the exception, but the rule

1. Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal. App. 451, 181 Pac. 98.

2. See supra, §§ 117–131, and §§ 155–169.

3. See cases cited infra, 8 Ruling Case Law, 1096.

4. Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

5. Norton v. Meader, 4 Sawy. 603, Fed. Cas. No. 10,351.

6. Stanley v. Green, 12 Cal. 148.

7. Salmon v. Wilson, 41 Cal 595.

8. Los Angeles etc. Land Co. v. Marr, 178 Cal. 243, 173 Pac. 83.

9. Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809.

10. Sears v. Ackerman, 138 Cal. 583, 71 Pac. 171.

11. Taylor v. Avila, 175 Cal. 203, 165 Pac. 533.

12. Grennan v. McGregor, 78 Cal. 258, 20 Pac. 559.

has its exceptions.[13] It has been held that a limitation in a deed to a quarry tract which was in effect a reservation, and which forbade the grantee from furnishing to others rock taken from the granted premises, was not invalid as being within the inhibition of the rule against agreements in restraint of trade.[14] A valid reservation or exception cannot be made in favor of a stranger to the deed.[15] And reservations and exceptions which are repugnant to the grant are void.[16]

§ 190. Application of Rules.—By statutory rule the language of a reservation in a grant is to be interpreted in favor of the grantor,[17] which is a different rule from that which existed prior to the code,[18] or at common law.[19] And the rule is held to apply to exceptions as well as to reservations.[20] It has also been applied to a limitation qualifying the estate granted, the limitation being held in effect to be a reservation.[1] In applying the general prin-

13. Marcone v. Dowell, 178 Cal. 396, 173 Pac. 465; Truett v. Adams, 66 Cal. 218, 5 Pac. 96; City of San Jose v. Uridias, 37 Cal. 339; Lummer v. Unruh, 25 Cal. App. 97, 142 Pac. 914. See EJECTMENT; QUIETING TITLE.

14. Pavkovich v. Southern Pac. R. Co., 150 Cal. 39, 87 Pac. 1097.

15. See infra, § 191.

16. See infra, § 192.

17. See Civ. Code, § 1069; Ballard v. Titus, 157 Cal. 673, 110 Pac. 118; Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Gardner v. San Gabriel V. Bank, 7 Cal. App. 106, 93 Pac. 900; Lewis v. Lewis, 3 Cal. App. 727, 86 Pac. 994; Smith v. Williams, 6 Cal. Unrep. 192, 55 Pac. 600 (per Temple, and Henshaw, JJ.).

18. Muller v. Boggs, 25 Cal. 175.

19. Coon v. Magnesite Co., 182 Cal. 597, 189 Pac. 271.

20. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Sears v. Ackerman, 138 Cal. 583, 71 Pac. 171; Yuba Inv. Co. v. Yuba Consol. Gold Fields, 184 Cal. 469, 194 Pac. 19; Seligman v. Carr, 8 Cal. App. 572, 97 Pac. 324. See Code Civ. Proc., § 1864. Compare Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889, in which the broad statement is made, based upon authorities of other jurisdictions, that "an exception in a private conveyance is to be construed strictly against the grantor."

1. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097.

ciple, it has been held that an exception in a deed of a strip of land for a road, the description of which was too indefinite to be a valid exception of the fee, would be construed as a reservation of an easement which need not be described with certainty.[2] And where a grantor excepted and reserved lands "heretofore conveyed," it was held the intention was to except and reserve lands previously sold and held under equitable titles.[3] Similarly, a deed excepting land previously granted is to be construed as excepting a reversionary interest therein.[4] Such construction in favor of the grantor must be lawful and reasonable.[5] But the rule is not absolute, and is to be considered in connection with other rules of interpretation contained in the code,[6] the most prominent of which is that all interpretations shall be directed toward the ascertainment of the true intention of the parties.[7] Thus, an exception will not be construed in favor of the grantor so as to defeat the conveyance,[8] the presumption being that the grantor intended by his deed to convey some property.[9]

§ 191. Words of Inheritance—Reservation in Favor of Stranger.—It being the characteristic of an exception that the thing excepted does not pass from the grantor to the grantee, it follows that words of inheritance are not required to enable the grantor to transfer what has been excepted.[10] A reservation, however, without words of in-

2. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271.

3. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

4. Seligman v. Carr, 8 Cal. App. 572, 97 Pac. 324 (holding against contention of counsel that the object of the exception was merely to protect the grantors from a warranty against previous conveyances).

5. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

6. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889; Currier v. Hawes, 103 Cal. 431, 37 Pac. 521; Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809.

7. Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809.

8. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889.

9. See supra, § 130, and compare supra, § 155.

10. Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Painter v. Pasadena Land & W. Co., 91 Cal. 74, 27 Pac. 539.

heritance, would, under the common-law rule, pass only a life interest, because it creates a new thing.[11] This distinction, of course, does not obtain in jurisdictions, as in California, where technical words of inheritance in grants are not necessary.[12] Hence a reservation of a right of profit a prendre without words of inheritance or express power of assignment is assignable; and upon principle the rule is applicable to reservations in general.[13] A reservation or exception in favor of a third person, without declaring a trust, or limiting a remainder, is void;[14] although under certain circumstances it may operate as an admission in his favor, or as an estoppel against the grantor.[15] Thus, an exception in a deed of a wife's separate property, executed jointly by the husband and wife, does not inure to them jointly, nor create a title in the husband, but leaves the title to the excepted land in the wife as her separate property, as fully as if no deed had been executed.[16] So conditions can only be reserved to the feoffer, donor or lessor and their heirs; but not to a stranger.[17] And a reservation expressed as made by a grantor "to its assigns and successors," and not "to itself, its assigns and successors," is within the rule.[18]

§ 192. Repugnancy to Grant.—An owner of land has a constitutional right to impose on a grant any reservations which he may see fit, the only limitation being that such right must be exercised in a way not forbidden by law.[19] Thus, a grantor may reserve in his deed a right to revoke

11. 8 Ruling Case Law, 1091.

12. See supra, § 133.

13. Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539.

14. Eldridge v. See Yup Co., 17 Cal. 44; and see cases cited infra. Compare supra, § 29.

15. Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal. App. 457, 181 Pac. 98.

16. Butler v. Gosling, 130 Cal. 422, 62 Pac. 596.

17. Wiseman v. McNulty, 25 Cal. 230.

18. Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal. App. 451, 181 Pac. 98.

19. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242.

or modify it,[20] as to all or any portion of the property therein described, and either as to a vested or a future interest.[1] Such a reservation, however, was void at common law, on the ground that it was repugnant to the grant. The common-law rule arose from the peculiar nature and purpose of the ceremony of livery of seisin which was a necessary part of an alienation by feoffment, and which required publicity and the presence of witnesses to preserve evidence of the transfer.[2] As a power to revoke a deed could defeat the transfer and effect a retransfer without such public ceremony and witnesses, the courts were forced to hold that such reservation in a feoffment was void. Not only does the reason for the common-law rule no longer obtain in view of the scheme provided by statute for the transfer of lands and public record of conveyances,[3] but the code expressly recognizes the validity of a reservation of a power to revoke or modify a deed.[4] Likewise, a provision in a deed expressly excepting and reserving the water, in, on or under the land conveyed,[5] or all marsh or water-bearing lands in the tract,[6] or reserving an easement,[7] or mining rights,[8] or

20. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Lewis v. Lewis, 3 Cal. App. 727, 86 Pac. 994 (decided under the provisions of the title of the Civil Code on Powers, then in force but afterwards repealed. The effect of the reservations in this case was held to leave the title vested in the grantor). President of Bowdoin College v. Merritt, 75 Fed. 480.

1. See Civ. Code, § 740.

2. See supra, § 4.

3. See supra, § 91.

4. Civ. Code, §§ 1229, 1230; Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 Pac. 242, construing Civ. Code, §§ 4, 740, 741, 1229, 1230, 1280, 1441, 3510. Referring to sections 1229 and 1230 the court says: "They entirely remove the foundation upon which these reservations, when inserted in deeds of feoffment, were held to be void, that is to prevent the dangers of secret transfers, to the detriment of the lord of the manor, or subsequent purchasers or encumbrancers."

5. San Rafael Ranch Co. v. Ralph Rogers Co., 154 Cal. 76, 96 Pac. 1092.

6. Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539.

7. Weller v. Brown, 160 Cal. 515, 117 Pac. 517.

8. Yuba Inv. Co. v. Yuba Consol.

the right to occupy and use the premises,[9] particularly where such use and occupation are made subject at all times to the wishes of the grantee,[10] is not necessarily inconsistent with or repugnant to the estate conveyed.[11] A reservation, otherwise valid, might be so framed as to be repugnant to the grant; but where the granting clause itself declares it is subject to the reservations therein contained, it could not be so.[12]

§ 193. Exceptions and Reservations Construed.—The construction of an exception or reservation in a deed often involves the question whether title to a thing has been retained or whether merely an incorporeal right has been credited, such as an easement or right of way,[13] or right in the nature of a profit a prendre, as a mining,[14] water,[15] or timber right.[16] And the solution of this question involves in turn the technical distinction between an excep-

Gold Fields, 184 Cal. 469, 194 Pac. 19.

9. Yuba Inv. Co. v. Yuba Consol. Gold Fields, 184 Cal. 469, 194 Pac. 19; Bank of Suisun v. Stark, 106 Cal. 202, 39 Pac. 531; "The words of reservation to the grantors, and the words of conveyance in praesenti to the grantee, may operate respectively to the full extent of the terms used and still be in perfect consonance with each other." Hihn v. Peck, 30 Cal. 281.

10. Yuba Inv. Co. v. Yuba Consol. Gold Fields, 184 Cal. 469, 194 Pac. 19.

11. Accordingly, it has been said, "If a grant of land be for twenty acres, and one acre be excepted therefrom, the exception is void because repugnant to the grant. So one may grant a farm, excepting the meadow; but to grant a pasture and meadow, excepting the meadow, would be repugnant and void." Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539.

12. Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242. Compare supra, § 125.

13. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271; Van Slyke v. Arrowhead etc. Power Co., 155 Cal. 675, 102 Pac. 816; Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809; Salter v. California Cycleway Co., 7 Cal. App. 170, 93 Pac. 1045.

14. Smith v. Cooley, 65 Cal. 46, 2 Pac. 880.

15. Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 Pac. 260; San Rafael Ranch Co. v. Ralph Rogers Co., 154 Cal. 76, 96 Pac. 1092; Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539; Lake Vineyard Land etc. Assn. v. San Gabriel Orange etc. Assn. 58 Cal. 51.

16. Sears v. Ackerman, 138 Cal. 583, 71 Pac. 171.

tion and reservation already noticed.[17] A provision in a deed reading "reserving and saving from the effect and operation of this conveyance" has been construed to be an exception as distinguished from a reservation.[18] So, "saving and excepting" from a grant is said to be apt phraseology for an exception, but where qualifying words are added, such as "for a road," there is indicated an intention to reserve an easement rather than to except the fee.[19] Consistently with the general theory of an exception,[20] where land is excepted from a grant for a specified use, there is not, merely by reason of such exception, any obligation on the part of the grantor to put it to such use, but he may dispose of it or may devote it to any use he may desire.[1] The granting part of a deed is not avoided by a defect in the exception; but the exception itself becomes ineffectual thereby, and the grant remains in force.[2] A reservation may create reciprocal easements, as where one granted part of his land reserving the right to reclaim the land granted along with other lands from an

17. See supra, § 187.

18. Butler v. Goslin, 130 Cal. 422, 62 Pac. 596.

19. Coon v. Sonoma Magnesite 182 Cal. 597, 189 Pac. 271.

20. See supra, § 187.

An exception does not include without mention things which are not appurtenant to what is excepted. Upham v. Hosking, 62 Cal. 250. Compare supra, §§ 151–154.

1. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271; Belknap v. Byington, 1 Cal. Unrep. 374.

An exception does not include oil and its products, with a reservation of the right to develop the same, gives the right to the grantor to carry on developing operations though there are no visible oil indications on the tract. Dietz v. Mission Transfer Co., 95 Cal. 92, 30 Pac. 380. The designation of water reserved as being for certain machinery has been held as fixing the measure of quantity, and not as fixing the manner of its use. Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282. The words "branch railroad," in a reservation of a strip of land on each side of a railroad track "or any branch railroad," were held to designate a side-track at a railroad station, where it was the only piece of railroad to which the description could apply. Grennan v. McGregor, 78 Cal. 258, 20 Pac. 559.

2. Marcone v. Dowell, 178 Cal. 396, 173 Pac. 465; Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889.

overflow of a lake, and with the right to enter and construct dams, ditches, etc.[3]

Right of way.—While a right of way may be created by reservation without being definitely located,[4] it has been held that such a right of way for the purpose of developing water is not necessarily created or implied from a reservation of the water produced on the granted premises in excess of a certain specified quantity.[5] And where a right of way "along and across" the land granted was expressly reserved in connection with an exception and reservation of "the right to take and use any and all water or waters in or under" the land, the right of way contemplated was held to be merely a right of ingress and egress, and not to confer the right to dig trenches and lay pipes for the conduct of water.[6]

§ 194. Reservation of Life Estate to Grantor.—In accordance with the common-law rule that one cannot grant an estate of freehold to commence in the future,[7] it was held, prior to the codes, that a deed which conveyed an estate of freehold to commence on the death of the grantor, but reserved to the grantor the possession and the rents, issues and profits of the property during his life, was void.[8] It was deemed to be a forced construction to consider such a deed as passing a freehold presently, and creating a new estate for life in the grantor by way of reservation. On the contrary, the effect of the deed was to grant the land in fee to the grantee, but with the qualification that the grantor should first retain a freehold for his own life, thus rendering it obnoxious to the rule.[9]

3. Hohenshell v. South Riverside etc. Co., 128 Cal. 627, 61 Pac. 371.

4. Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351.

5. Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 Pac. 260. See WATERS.

6. San Rafael Ranch Co. v. Ralph Rogers Co., 154 Cal. 76, 96 Pac. 1092.

7. See supra, § 147.

8. Chandler v. Chandler, 55 Cal. 267; Hawes v. Stebbins, 49 Cal. 369.

9. Hawes v. Stebbins, 49 Cal. 369.

It was held in an early case, that the objection could in a proper case be obviated, and a true reservation of a life estate created, by equity decreeing a formal conveyance by the grantor to the grantee, and a reconveyance for the life of the former by the latter.[10]

The objection to a reservation of a life estate, as creating a freehold to commence in futuro, has been removed by statute.[11] A life estate cannot, of course, be reserved to the grantor by oral agreement in view of the statute of frauds,[12] and where a deed is absolute in form parol evidence is not admissible to show an intention to reserve a life estate;[13] although such a reservation may in effect be accomplished by the delivery of an absolute deed to a third person to be delivered to the grantee upon the grantor's death.[14] Where under the terms of a written agreement executed with a deed the grantor was employed to manage the property, and he and his wife were to occupy the premises during their lives free of rent and charges, the two instruments were properly construed together, and they were entitled to possession so long as the agreement was performed on the part of the grantor, whether the transaction amounted to a reservation of a technical life estate or not.[15] The words "the right to use, occupy and enjoy" an estate for life creates a freehold, whether contained in a grant or a reservation or exception in a grant.[16]

10. Chandler v. Chandler, 55 Cal. 267.

11. See supra, § 148; Tennant v. John Tennant M. Home, 167 Cal. 570, 140 Pac. 242; Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276. See LIFE ESTATES.

12. Code Civ. Proc., § 1971; and see Civ. Code, § 1624.

13. Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331.

14. See supra, § 70. A reservation of use to the grantor during his life may make a purported conveyance testamentary in character. See supra, § 10.

15. Weeks v. Link, 137 Cal. 502, 70 Pac. 548.

16. Hawes v. Stebbins, 49 Cal. 369.

XII. CONDITIONS AND RESTRICTIONS.

In General.

§ 195. Code Provisions and Definitions—Void Conditions.—In reference to conditions in deeds the code provides as follows:

"An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."[17]

"Conditions may be precedent, concurrent or subsequent."[18]

"Conditions concurrent are those which are mutually dependent, and are to be performed at the same time."[19]

A condition is defined as a qualification annexed to an estate by the grantor, upon the happening or breach of which the estate granted is enlarged or defeated.[20] In its most extended signification, a condition is a clause in a contract or agreement whose object is to suspend, rescind or to modify the principal obligation.[1]

Void conditions.—"A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the article on the object of contracts, or which

17. Civ. Code, § 1434.

18. Civ. Code, § 1435.

"Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right." Civ. Code, § 708. See infra, § 202 et seq., as to conditions precedent; and infra, § 205 et seq., as to conditions subsequent.

By onerous title under the Spanish and Mexican law was meant that which was created by a valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions, or payment of charges, to which the property was subject. Lucrative title was created by donations, devise, or descent. Scott v. Ward, 13 Cal. 458. See PUBLIC LANDS as to construction of grants upon condition.

19. Civ. Code, § 1437.

20. Anderson v. Palladine, 39 Cal. App. 256, 178 Pac. 553.

1. Wiseman v. McNulty, 25 Cal. 230. As to conditions in contracts generally, see CONTRACTS, vol. 6, p. 360.

is repugnant to the nature of the interest created by the contract, is void."[2]

A condition subsequent, which is impossible of performance, is void.[3] Where there is a provision in the deed that in case certain specified acts are not performed the deed shall be null and void, the transaction constitutes a conveyance with condition subsequent; and if the condition be void, as where the acts to be performed are against public policy and are immoral, the deed takes effect freed from the condition.[4] A condition precedent, on the other hand, though impossible from the beginning, or for any reason incapable of performance, is not for that reason void, but operates to prevent the estate from vesting.[5]

"If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect and the condition is void."[6]

"Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage."[7]

§ 196. Distinctions.—The distinction between conditions and covenants is a decided one and the principles applicable quite different.[8] A condition is a qualification annexed to an estate, upon the happening of which the estate is enlarged or defeated, and it differs from a covenant, in

2. Civ. Code, § 1441; Burdell v. Grandi, 152 Cal. 376, 125 Am. St. Rep. 61, 14 L. R. A. (N. S.) 909, 92 Pac. 1022 (where the condition was designed solely for the purpose of reserving a monoply in the grantor). See infra, § 199, as to conditions repugnant to the estate conveyed.

3. Stockton v. Weber, 98 Cal. 433, 33 Pac. 332.

4. Patterson v. Donner, 48 Cal. 369.

5. Stockton v. Weber, 98 Cal. 433, 33 Pac. 332.

6. Civ. Code, § 709.

7. Civ. Code, § 710.

8. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 9 A. L. R. 115, 186 Pac. 596. And see cases cited infra.

that it is created by mutual agreement of the parties, and is binding upon both, whereas a covenant is an agreement of the covenantor only.[9] A breach of a condition on which an estate is granted works a forfeiture of the estate, while the breach of a sole agreement of the covenantor is merely ground for the recovery of damages.[10] In the construction of a conveyance, ordinarily, to avoid forfeiture, conditions will be construed as covenants, when this can reasonably be done;[11] but a covenant instead of a condition will never be implied contrary to the intention of the parties.[12] The following illustration clearly shows these fundamental differences. A deed conveying property to a university recited that the conveyance was made upon "express conditions" therein named,—(1) That the land conveyed shall be devoted exclusively as a part of the campus of the university, and that no buildings shall be erected thereon except those devoted to university purposes; (2) that at least one building, costing not less than ten thousand dollars, shall be erected on said campus on or before a certain date; (3) that the premises described in the deed shall revert to the grantors if abandoned or devoted to purposes other than those specified at any time before a certain named date, but under no circumstances is a forfeiture to occur after that date. It was held that

9. Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647; Braman v. Mesick, 1 Lab. 24. See Los Angeles etc. Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308, distinguishing between covenants and conditions.

10. See COVENANTS, vol. 7, p. 711. (§ 3 and cases cited in note 13.)

11. Victoria Hospital Assn. v. All Persons, etc., 169 Cal. 455, 147 Pac. 124; Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794; Lucy v. Davis, 163 Cal. 611, 126 Pac. 490; Weller v. Brown, 160 Cal. 515, 117 Pac. 517; Hawley v. Kafitz, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248; Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 62 Pac. 295; Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647. And see sases cited generally, in COVENANTS, vol. 7, p. 713.

12. Knight v. Black, 19 Cal. App. 518, 126 Pac. 512; Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

the first clause was a covenant, and that the other two were conditions.[13]

There is also a broad distinction between a right based upon an estate in reversion to take effect in possession on the expiration of the particular estate granted, and the right, on the other hand, based upon forfeiture and the right of re-entry for breach of a condition subsequent.[14] And there is a distinction between a conveyance on condition precedent and a mere executory agreement for the sale and purchase of lands. The former is a conveyance and on the performance of the condition transfer the estate.[15]

§ 197. Condition as a Contract.—For the creation of a condition, for the annexing or reserving of a condition, precedent or subsequent, to or upon an estate, whether it is created directly by agreement or arises by implication of law—except in case of a will—two contracting parties are necessary, who have at the time, or successively, an interest in the estate upon which the condition is reserved. And so, except where there is a will,[16] this definition necessarily requires the execution of a contract.[17] Accordingly, the general rule applies that to make a deed with conditions effective the grantee must be a person

13. Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647. See infra, § 201, as to words and intention in creating a condition. See note, 7 A. L. R. 1429, as to grant of land for church purposes, distinction between condition and covenant in.

14. Conlin v. Southern Pac. R. R. Co., 40 Cal. App. 733, 182 Pac. 67 (citing authorities. See REVERSIONS); East San Mateo Land Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634.

A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate, and every such remainder is to be deemed a conditional limitation. Civ. Code, § 778; Scott v. Ward, 13 Cal. 458.

15. Braman v. Mesick, 1 Lab. 24. See Scott v. Ward, 13 Cal. 458, holding that a grant may be expressed to be upon condition although construed as a limitation or qualification of the grant.

16. See WILLS.

17. Wiseman v. McNulty, 25 Cal. 230.

either natural or artificial, capable of taking the property conveyed, and that a deed is void unless the grantee named has such capability.[18] Inasmuch as an estate in land is required to support a condition,[19] and since agreements respecting lands are, as a rule, required to be in writing,[20] it has been declared that conditions cannot be annexed to estates of inheritance or freehold estates without deed.[1]

§ 198. Estate Required to Support Condition.—In general, an estate or interest in the grantor is required to support a condition.[2] And so, if the owner of land makes an absolute conveyance of it, and afterward makes a conveyance to the grantee or his assign, loaded with conditions, the conditions cannot operate, for there is no estate remaining in the grantor upon which the conditions can take effect.[3] A condition cannot be annexed to an estate in land by a party owning it, and who continues to hold all the interest he ever had in it, which condition is of such a character that upon its breach the estate shall vest by forfeiture in a person who never held any interest in the land, and has not attempted to convey it. Conditions annexed to an estate in lands can only be reserved to the feoffer, donor or lessor or their heirs; but not to a stranger.[4] However, a conditional right to the reversion of the title in the grantor or his heirs or assigns may be sufficient to support the condition, and a condition on breach of which the property shall revert may be attached to an estate less than a fee, such, for example, as a right of way.[5]

18. Rixford v. Zeigler, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092 (citing to this point Wiseman v. McNulty, 25 Cal. 230).

19. See infra, § 198.

20. See FRAUDS, STATUTE OF.

1. Braman v. Mesick, 1 Lab. 24.

2. See cases cited infra.

3. Alemany v. Daly, 36 Cal. 90.

4. Wiseman v. McNulty, 25 Cal. 230.

5. East San Mateo Land Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634. As to conditions in right-of way, deeds, generally, see RAILROADS.

§ 199. Condition Repugnant to Grant.—It is a general rule that conditions which are repugnant to the interest created by deed are void.[6] And so, where from the whole of the instrument, the intent is clear to convey an unqualified fee, the attempt to put restrictions upon its alienation will be held void under the rule laid down in section 711 of the Civil Code.[7] This rule which originally prevailed at common law does not, however, apply to expressions or conditions which merely limit and qualify the effect and meaning of the granting clause in a deed so that it operates to transfer a limited estate. It does not apply unless the condition refers to the estate actually granted. Where the intention to be gathered from the deed as a whole, including the otherwise void conditions, is that a lesser estate was to be conveyed, then such intention must prevail, and, as the effect will be that no fee is conveyed by the deed, there will be nothing upon which the restrictions upon the alienation of the fee can operate. In such cases the other provisions in the deed operate on and affect its true meaning, the granting clause is to be taken in the limited sense which the entire instrument shows it was intended to have, and the limitations and conditions relating to the fee are not to be considered as repugnant to the grant, but as descriptive of the estate conveyed, and in harmony with the grant when truly interpreted.[8] This rule prevailed at common law, and it is also made a part of the code.[9] So, too, the rule that a prohibition or limi-

6. See Civ. Code, § 711; and see cases cited infra in this and succeeding sections in reference to alienations, use and building restrictions.

7. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Murray v. Green, 64 Cal. 363, 28 Pac. 118.

And so, if one conveys land in fee simple, and neither excepts any part nor reserves anything to himself out of it, but restricts the grantee to a particular use of the land, this restriction is void, as inconsistent with the title conveyed. Such a restriction may be imposed, and may be good as a condition or covenant, but in no other form. Eldridge v. See Yup Co., 17 Cal. 44.

8. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

9. Civ. Code, § 1105; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

tation of the use of property granted, which is inconsistent with the title conveyed, is void, has no application where an estate in fee does not pass to the grantee. A limitation or qualification of a grant which is a part of the granting clause itself cannot be said to create or constitute an inconsistent or irreconcilable part of the deed within section 1070 of the Civil Code. The whole granting clause in such case constitutes but one part of the deed.[10]

It has been held that a condition subsequent forfeiting the title to the grantor in case of breach is not repugnant to the granting clause, nor does it come within the terms of the code prohibiting or limiting restraints on alienation. A grantee of a fee subject to a condition is at liberty at all times to convey what title he has. But his title is limited to that of an estate subject to divestiture upon condition subsequent, and he could not enlarge this estate by conveying to a purchaser taking with notice.[11]

§ 200. Rule of Construction.—The code provides that:

"A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."[12]

"A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant

10. Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465.

11. Firth v. Marovich, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729. See infra, § 205 et seq., as to conditions subsequent generally.

12. Civ. Code, § 1442; San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 Pac. 325 (rule applied to stipulation in a contract as a condition precedent); Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794; Lucy v. Davis, 163 Cal. 611, 126 Pac. 490; Reclamation Dist. No. 551, v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638; Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 62 Pac. 295; Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Alexander v. Jackson, 92 Cal. 514, 27 Am. St. Rep. 158, 28 Pac. 593; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222 (applying the rule to grant of pueblo lands. See PUBLIC LANDS); Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622; Brown v. Wrightman, 5 Cal. App. 391, 90 Pac. 467; Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor."[13]

Conditions are not favored in law, and are construed strictly, because they tend to destroy estates,[14] and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction.[15] Conditions can only be created by apt and appropriate language which ex proprio vigore establishes that only a conditional estate was conveyed,[16] and when such an estate is shown to have been created, the rule of construction is that of strictness against the grantor and in favor of the holder of the estate.[17]

But while this is an established rule of construction, it is also true that where words have been used which show a clear and unmistakable intention on the part of the grantor to create an estate on condition, such a condition will be upheld.[18] Hence, the parties to a deed may, if they think proper, agree that any matter shall be a condi-

13. Civ. Code, § 1069; Cooper v. Selig, 32 Cal. App. Dec. 604, 191 Pac. 983. See supra, § 187 et seq., as to reservations; and see PUBLIC LANDS, as to grants by public officers.

14. Whitaker v. Regents of University of California, 39 Cal. App. 111, 178 Pac. 308; Shaw v. Caldwell, 16 Cal. App. 1, 115 Pac. 941; Smith v. Williams, 6 Cal. Unrep. 193, 55 Pac. 600 (in dissenting opinion of Temple and Henshaw, J. J.); Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647. See Schwab v. Bridge, 27 Cal. App. 204, 149 Pac. 603, citing Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 309, 73 Pac. 966, (where the rule was applied to a contract). See for the rule generally, CONTRACTS, vol. 6, p. 360 et seq; and FORFEITURES.

15. Victoria Hospital Assn. v. All Persons etc., 169 Cal. 455, 147 Pac. 124. And see supra, § 196.

16. See infra, § 201, as to words and intention.

17. Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794.

18. Firth v. Marovich, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729; Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935.

This is especially so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee. Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385.

tion precedent; and if words are used in the contract so precise, express, and strong that such intention only is compatible with the terms employed, a court can only give effect to such declared intention of the parties.[19]

The rule of strict construction above stated is to be distinguished from that which obtains where the limitation is to be taken as qualifying the estate granted for the benefit of the grantors. In such case the reservation is to be liberally construed in favor of the grantors and their successors.[20]

Rule of strict construction applied.—In an action to quiet title, a deed conveying "all the timber now growing and standing" on certain described lands, with the right of ingress and egress at all times within ten years to cut and remove "the timber hereby granted," with the right to construct logging roads, etc., and "together with all other rights and privileges necessary for the full enjoyment by said grantees of this grant" was held to be an absolute sale and grant of the timber, and not the creation of an estate upon condition subsequent.[1] In a case where one granted an undivided one-half interest in mining property and the deed contained a provision that the grantees might develop and work the grantor's half interest with their own, dividing the proceeds, it has been held that even if such provision should be deemed a promise and part of the consideration for the grant, and not merely permissive, it could not constitute a condition subsequent nor modify in any degree the estate conveyed.[2] And

19. Schwab v. Bridge, 27 Cal. App. 204, 149 Pac. 603.

20. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097. See Civ. Code, § 1069; and see supra, § 188 et seq., as to rule of construction of reservations.

1. Anderson v. Palladine, 39 Cal. App. 256, 178 Pac. 553 (holding that the clause "together with all other rights and privileges necessary," etc., clearly contemplated that there should be no forfeiture of the rights to the timber by mere delay in its removal, but that the grantee of the timber should have additional time within reason for its removal if found necessary).

2. Shaw v. Caldwell, 16 Cal. App. 1, 115 Pac. 941.

where a deed of a mine was executed, the sole consideration of which was a contemporaneous written agreement providing that the grantee should have the exclusive right to work the mine, and should mill and reduce all ores taken therefrom, and deliver one-third of all minerals to the grantor, it has been held that such deed and agreement constituted in effect one instrument, and must be read as though each referred to the other and expressly incorporated its terms, and so read the deed in such case is subject to the conditions set forth in the agreement.[3]

§ 201. Words—Intention.—It is a general rule that conditions subsequent relied upon to create a forfeiture can be created only by express terms or clear implication.[4] Generally, the apt and appropriate words evidencing that a grant is on condition subsequent are found in a provision for forfeiture and right of re-entry.[5] The language employed may, however, declare a condition and import a forfeiture without a clause of re-entry.[6] The words "on condition that" are also apt and appropriate words, both in their technical and popular sense to create the condition, and such words import the condition,[7] in the absence of other language inconsistent therewith.[8] The language

3. Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385 (modifying judgment rendered in department and reported in 6 Cal. Unrep. 582, 62 Pac. 1055).

4. Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794; Hawley v. Kafitz, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248; Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 62 Pac. 295; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Womble v. Womble, 14 Cal. App. 739, 113 Pac. 353; And cases cited infra. Reservations, however, are interpreted in favor of the grantor. See Civ. Code, § 1069; and see supra, § 188 et seq., as to reservations, and supra, § 200, as to conditions.

5. Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794.

6. See infra, § 220.

7. Victoria Hospital Assn. v. All Persons etc., 169 Cal. 455, 147 Pac. 124 (stating the rule).

8. Victoria Hospital Assn. v. All Persons etc., 169 Cal. 455, 147 Pac. 124 (holding that notwithstanding the use of the words "upon the express condition," the whole instrument may be construed as mani-

creating such a condition must be so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created,—language which ex proprio vigore imports such a condition.[9] Merely reciting in a deed that it is in consideration of the payment of a certain sum, and that the grantee shall do other things specified therein does not create a condition subsequent.[10]

Whether a clause in a deed creates a condition subsequent or a mere personal covenant is a matter of legal interpretation for the court.[11] In construing the terms of a conveyance as to whether a stipulation in the nature of a statement of a condition subsequent, the observance of which would work to defeat the title of the grantee, was intended as a covenant or strictly as a condition, the effort of the court will be to prevent a forfeiture,[12] and in case

festing no intent to express a condition affecting the title to the land and therefore not properly a condition subsequent). But see Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385 (holding that the word "condition" is not necessary to the creation of an estate upon condition if it plainly appears from the words used that the intent of the parties was to create an estate of that description).

Conversely, the use of words expressly stating that the title shall only vest upon the performance of a condition precedent is not necessary. Stockton v. Weber, 98 Cal. 433, 33 Pac. 332. See infra, § 204, as to "proviso."

9. Victoria Hospital Assn. v. All Persons etc., 169 Cal. 455, 147 Pac. 124; Hawley v. Kafitz, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248; Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Anderson v. Palladine, 39 Cal. App. 256, 178 Pac. 553; Shaw v. Caldwell, 16 Cal. App. 1, 115 Pac. 941; Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622; Womble v. Womble, 14 Cal. App. 739, 113 Pac. 353; Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254 (rule applied to grant of right of way).

10. Womble v. Womble, 14 Cal. App. 739, 113 Pac. 353.

11. Hawley v. Kafitz, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248.

12. See supra, § 200.

If the instrument can be reasonably interpreted so as to avoid a forfeiture it is the duty of the court to do so. Quatman v. McCray, 128 Cal. 285, 60 Pac. 855 (holding, under a deed conveying four town lots, and conditioned that any dwelling-house erected "upon these premises" shall cost not less than a sum named, that the erection of a house costing a less sum on one of two lots adjoining each other works a forfeiture only as to

of doubt as to the agreement it will be held to import a covenant rather than a condition.[13] The mere formal arrangement of the words will not wholly influence the court in determining what the clause was inserted to accomplish, but in this as in every other case, the court will be guided by the probable intention, viewing the matter in the light of reason.[14]

Conditions Precedent.

§ 202. In General.—A condition precedent is defined by the code "as one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."[15]

Conditions precedent are such as must happen, or be performed before the estate can vest or be enlarged.[16]

the lot on which the house is erected).

13. Victoria Hospital Assn. v. All Persons etc., 169 Cal. 455, 147 Pac. 124; Anderson v. Palladine, 39 Cal. App. 256, 178 Pac. 553; Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac. 935; Los Angeles University v. Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262.

14. Mere words should not be, and have not usually been, deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate, unless from the proofs such appears to have been the distinct intention of the grantor and a necessary understanding of the parties to the instrument. Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647. The intention of the parties must be determined from the language of the covenant itself, considered in the light of the entire context of the instrument and the circumstances existing at the time when the covenant is made. Victoria Hospital Assn. v. All Persons etc., 169 Cal. 455, 147 Pac. 124; Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 Pac. 677; Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385; Bank of Suisun v. Stark, 106 Cal. 202, 39 Pac. 531 (holding that a condition subsequent is created by a grant with the provision that upon violation of the condition the property shall immediately revert to "the party of the first part, his heirs, executors, administrators or assigns"). Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622.

The tendency of modern decisions is to uphold conveyances, and give effect to the intention of the parties, regardless of technical rules of construction. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047.

15. Civ. Code, § 1436.

16. Brannan v. Mesick, 10 Cal. 95. See infra, § 203.

Where a deed contains a covenant that, in case the grantees therein named shall pay a certain sum of money before a certain day, "then this instrument is to take effect as a full and complete conveyance in fee," it was held that the payment of the purchase money was a condition precedent to the vesting of the legal estate; and the intention gathered from the terms of such an instrument is, that the grantor bound himself to convey only upon the payment of the purchase money—in other words, upon performance of the condition precedent.[17] A deed of conveyance in consideration of a certain sum to be paid in specified installments and providing in case the payments should be made as stipulated, "then this instrument is to take effect as a full and complete conveyance in fee," etc., is a conveyance upon condition precedent and upon performance of the condition the title is vested in the grantee.[18] But there is no definition of a condition precedent which embraces a paper containing words of sale in praesenti, and then providing for the payment of the purchase money on subsequent condition. In such an instrument the vesting of the title is not made to depend upon any future acts or facts.[19] Likewise, where upon the giving of a deed conveying land in praesenti for a consideration, the grantee covenants to perform certain acts, stipulating that in case of failure to perform the deed shall be void, the grantor to remain in possession until performance, it was held that the conditions were not conditions precedent.[20]

17. Mesick v. Sunderland, 6 Cal. 297.

18. Talbert v. Hopper, 42 Cal. 397. And see infra, § 203, as to when estate passes under a condition precedent.

19. Smith v. Brannan, 13 Cal. 107; Cayton v. Walker, 10 Cal. 450.

A deed of conveyance which reserves to the grantor an undivided fractional part thereof, to be laid out on a specified part of the land conveyed, does not provide a condition precedent to the vesting of title in the grantees; such a provision contains none of the elements of a condition precedent. Salmon v. Wilson, 41 Cal. 595.

20. Hihn v. Peck, 30 Cal. 280. See Ferris v. Coover, 10 Cal. 589, holding certain clauses in a public grant against the obstruction of highways and navigation of the streams within its confines to be

Where conditions are concurrent.—

"Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section."[1]

"If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."[2]

§ 203. When Estate Passes.—The code provides that "An instrument purporting to be a grant of real property to take effect upon condition precedent, passes the estate upon the performance of the condition."[3] It is a well-known maxim that where the estate is to arise upon a condition precedent, it cannot vest till that condition is performed, and this has been so strongly adhered to, that even where the condition has become impossible, no estate or interest grew thereupon.[4] A deed on such a condition is not a title, or proof of title; because the fee is dependent, not on the terms of the deed, but proof of performance of those terms. It is the event which casts the title, not the deed.[5] It follows from the principles above stated that upon a failure of a grantee to perform a condition

not properly conditions but reservations in favor of the public.

1. Civ. Code, § 1439. See CONTRACTS, vol. 6, p. 400, and cases there cited construing this code section.

2. Civ. Code, § 1440. See CONTRACTS, vol. 6, p. 399 et seq., as to performance and prevention of performance of conditions generally; and see infra, § 203.

3. Civ. Code, § 1110; Bank of Suisun v. Stark, 106 Cal. 202, 39 Pac. 531.

4. Brannan v. Mesick, 10 Cal. 95. A deed on condition precedent vests the title in the grantee, on the performance of the condition without any further act on the part of the grantor.

5. Mesick v. Sunderland, 6 Cal. 297.

precedent, the grantor holds and may convey title as if the deed had never been made.[6]

Upon a condition precedent, therefore, performance of the condition vests the title, as distinguished from the rule applying to a condition subsequent, the title in the latter case passing at the time the deed is executed and delivered.[7] A condition precedent, if not performed, prevents the estate from vesting, and in such case there can be no reverter; but a condition subsequent does not prevent the estate from vesting, and therefore upon a breach the grantor cannot again have the title except by a reverter, based upon the breach and a re-entry therefor.[8]

Delivery of deed in escrow.—In a case where the delivery of a deed to a third person with the understanding that the performance of the grantee's agreement to support the grantor was a condition precedent to the vesting of title in the grantee upon the death of the grantor, the deposit being for security only, it was held that the condition being broken by nonperformance, the deed should be redelivered and the grantor should be relieved from the agreement.[9]

Prevention of performance.—Under the general rule that the prevention by one party will excuse performance of a contract by the other,[10] performance of a condition precedent cannot be required by one who has prevented its performance. Under such circumstances neither the covenantee entitled to the benefit of the condition nor his

6. Brannan v. Mesick, 10 Cal. 95.

7. Spect v. Gregg, 51 Cal. 198. See infra, § 205 et seq.

8. Stockton v. Weber, 98 Cal. 433, 33 Pac. 332. See infra, § 223, as to reverter.

9. Howlin v. Castro, 136 Cal. 605, 69 Pac. 432. See Smyth v. Fitch, 32 Cal. App. Dec. 228, 190 Pac. 1049, where it was held that the evidence was sufficient to sustain the finding that the conditions as to support and maintenance of the grantor as consideration for the deed were complied with.

10. See CONTRACTS, vol. 6, p. 436 et seq.

grantee can take advantage of the want of performance by the covenantor.[11]

§ 204. **"Proviso."**—A "proviso" in deeds is a limitation or exception to the grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided. It always implies a condition, unless subsequent words change it into a covenant. The word "provided" expresses as much, and is one of the apt words commonly used to create a condition. And so, where a grant, bargain and sale deed to a city, of a block of land to be kept as an ornamental square and for the erection of public buildings thereon, was made, provided the city by its legal representatives obtains authority from the legislature of the state, and makes the necessary removals of the dead from the said block within a specified time, it was held that such provision was a condition precedent, and that the failure of the city to perform such condition prevented title from vesting in the city under the deed.[12]

Conditions Subsequent Generally.

§ 205. **Definitions.**—A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.[13] In other words, a condition subsequent in a deed is that which in terms operates upon an estate conveyed and renders it liable to be defeated for breach of the condition.[14] Whether a condition is to be deemed precedent or subsequent depends upon the intention of the parties as shown

11. Houghton v. Steele, 58 Cal. 421.

12. Stockton v. Weber, 98 Cal. 433, 33 Pac. 332.

13. Civ. Code, § 1438.

14. Hawley v. Kafitz, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248.

by the instrument, and not upon the use of any particular set of technical words.[15]

§ 206. Various Conditions Subsequent.—Building restrictions in a deed afford a common example of conditions subsequent;[16] and a condition subsequent is created by an original grant in praesenti upon condition annexed to it requiring the making of improvements within a certain time,[17] or where such a grant is upon the express condition that the grantee shall make certain specified payments for support of the grantor or others named in the deed.[18] If a promise of this latter type was made by one in a relation of trust and confidence and the deed was given solely on account of such trust and confidence, it may be set aside where it afterward appears that the promise was violated and that it was made without any intention of keeping it.[19] But the rule is different where no question of actual

15. Bank of Suisun v. Stark, 106 Cal. 202, 39 Pac. 531. See supra, § 201, as to words and intention.

16. See infra, § 214 et seq., as to building restrictions.

17. Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Liebrand v. Otto, 56 Cal. 242; Firth v. Los Angeles Pac. Land Co., 28 Cal. App. 399, 152 Pac. 935.

18. Bank of Suisun v. Stark, 106 Cal. 202, 39 Pac. 531 (holding that the title is not affected by the reservation to the grantors of the right to live in and occupy the house on the premises, and to be supported and clothed out of the yearly proceeds of the premises so long as they should live). See cases cited infra. As to delivery of such a deed in escrow, and the passing of the title thereunder, see Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837. And, generally, see ESCROW.

19. Miller v. Shaw, 34 Cal. App. Dec. 180, 195 Pac. 743; Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

It has been held that a suit for a reconveyance of real property, conveyed by a woman over seventy years of age, to her son, upon condition that he would apply to her support and maintenance so much of the rents and profits as should be sufficient to support and maintain her in a suitable manner during the rest of her life, cannot bring relief from such a fraud where a judgment between the parties for the same thing is pleaded, and this even though such prior judgment is palpably erroneous, and even though the court finds that the conveyance was without consideration, and upon the condition mentioned; that for nearly

fraud is involved, and the facts show that there were no confidential relations upon which constructive fraud could be predicated.[20]

In a case where an easement is granted for a right of way upon condition that it should revert to the grantor unless the road should be completed and used within a specified time, it has been held that the purchaser of the property under a deed from the personal representative of the grantor was entitled to enforce forfeiture for failure to comply with the conditions of the grant.[1] On the other hand, a deed to a railroad corporation which conveys the land described in such deed to the corporation and its successors "during the legal existence of said company," and provides that at the expiration of the legal existence of the company, the same shall "revert to the said party of the first part [grantor], his heirs or assigns, notwithstanding anything herein contained to the contrary," shows an intention to limit the duration of the grant to the period of the legal existence of the company, and not an intention to dedicate irrevocably the land to railroad use upon a condition subsequent.[2] And it has been held that an agreement in a deed to assume and pay a mortgage as a part of

two years before the commencement of the suit the son has not applied any portion of the rents and profits to the support of his mother; that he declared a homestead upon the property, and conveyed half of it to other persons, without consideration; and that he mortgaged it, with the intent on his part to prevent the plaintiff from recovering anything from him. Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54. In this case the court said: "So far as this case is concerned, the result reached is to be regretted. It is a shameful thing that a son should refuse to support his aged mother after obtaining her property, without consideration, upon the condition mentioned. But the law must be declared."

20. Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385; Smith v. Mason, 122 Cal. 426, 55 Pac. 143; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910. See Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029, comparing the rules.

1. Salter v. California Cycleway Co., 7 Cal. App. 170, 93 Pac. 1045.

2. East San Mateo Land Co. v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634.

the consideration for the conveyance is not a condition upon breach of which the title revests in the grantor.[3]

Restraints upon Alienation as Conditions Subsequent.

§ 207. In General.—Conditions restraining alienation, when repugnant to the interest created, are void.[4] The right of alienation is an inherent and inseparable quality of an estate in fee simple.[5] Therefore, any and all restraints on alienation necessarily must tend to deprive the granted estate of an incident inseparably inherent in it, and necessarily must be repugnant to and inconsistent with the grant, and, as such, void.[6] The rule that conditions restraining alienation, when repugnant to the estate conveyed, are void, is founded on the postulate that the conveyance of a fee is a conveyance of the whole estate, that the right of alienation is an inherent and inseparable quality of an estate in fee simple, and that, therefore, a condition against alienation is repugnant to, and inconsistent with, the estate conveyed.[7] But the rule is not

3. Martin v. Splivalo, 69 Cal. 611, 11 Pac. 484; Hartman v. Reed, 50 Cal. 485. See MORTGAGES.

4. Civ. Code, § 711.

5. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 9 A. L. R. 115, 186 Pac. 596; Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470.

The law neither presumes nor favors restraints upon alienations of property, one of the attributes of property being the power to sell and dispose of it. Ingoldsby v. Juan, 12 Cal. 564. See PERPETUITIES.

6. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 9 A. L. R. 115, 186 Pac. 596 (holding that a provision in a deed that the property shall not be sold, leased, or rented to any persons other than of the Caucasian race, is a restraint on alienation and falls within section 711 of the Civil Code. See infra, § 209). Bonnell v. McLaughlin, 173 Cal. 213, 159 Pac. 590; Prey v. Stanley, 110 Cal. 423, 42 Pac. 908; Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451 (where the provision was construed as a covenant and stating the rule applicable if provision be regarded as a condition); Murray v. Green, 64 Cal. 363, 28 Pac. 118; Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470. See Smith v. Williams, 6 Cal. Unrep. 193, 55 Pac. 600 (dissenting opinion of Temple, J., and cases there cited).

7. Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470.

Where a clause in a deed is void as a restraint on alienation, the

founded exclusively upon this the principle of natural law. It rests also on grounds of clear public policy and convenience in facilitating the exchange of property, in simplifying its ownership, and in freeing it from embarrassments which are injurious, not only to the possessor, but to the public at large.[8] The rule does not depend upon the mere form in which the restraint is imposed,[9] and hence is equally applicable whether the provision be a condition subsequent, a conditional limitation, or a covenant.[10] The question of the right to impose conditions or restrictions upon alienation stands upon common-law reasons, as it has stood in England since the statute quia emptores. When from a fair consideration of all the parts of a deed it appears that it was the intention by other expressions in the deed, to limit and qualify the effect and meaning of the granting clause, so that it should not operate to transfer the entire estate, but only a limited estate, the rule that repugnant conditions restraining alienation are void, does not apply, unless the conditions refer to the limited estate actually granted.[11]

Partial restraints.—It has been said that the decisions respecting the validity of a restraint that is only partial as to persons or temporary as to time are in a state of

conveyance is good, and the clause is to be disregarded. Murray v. Green, 64 Cal. 363, 28 Pac. 118. See note, 11 A. L. R. 23, as to effect on validity and character of instrument in form of deed of provisions postponing or limiting rights of grantee until after death of grantor.

8. Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470, per Finlayson, J.

9. Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276; Prey v. Stanley, 110 Cal. 423, 42 Pac. 908; Murray v. Green, 64 Cal. 363, 28 Pac. 118.

10. Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276; Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470.

The rule avoids, as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor; such covenants, if not within the letter of section 711 of the Civil Code, are yet obnoxious to the policy of which that section is a partial expression. Prey v. Stanley, 110 Cal. 423, 42 Pac. 908.

11. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

conflict and confusion.[12] However, it has been said that no matter how large or how partial and infinitesimal the restraint may be, the principles of natural right, the reasons of public policy, and the principle of the common law alike forbid it, and that, on principle, any restraint on alienation, either as to persons or time, is invalid. The only safe rule is to hold that a condition that restrains the power of alienation to any extent whatever, whether as to persons or time, is inconsistent with the estate granted.[13]

§ 208. Rule Applied.—Where land is conveyed absolutely to a mother as a gift from her son, who paid the consideration therefor, a subsquent contract reciting the facts with a covenant that the land should not be sold or conveyed without his consent, and that he was to be the manager thereof for her benefit, and that upon her death it was to be divided between her lawful heirs, is void as restraining alienation and being repugnant to the grant.[14] Likewise, a condition is in restraint of alienation and void which prohibits the grantee from conveying without the consent of the grantor;[15] or where it is provided that the property conveyed by deed absolute shall not be sold, leased or rented to any person other than of the Caucasian race.[16] And where a deed purported to convey the absolute fee-simple title to land, and was in the usual form except that it was made "subject to the limitation and conditions herein expressed," a provision therein that "This grant is made upon the express condition and limitation,

12. Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470. See Civ. Code, § 715, and see Civ. Code, § 772, as to contingent remainder in fee. See, generally, PERPETUITIES; REMAINDERS.

That a partial restraint on alienation is good is doubted but not decided. Murray v. Green, 64 Cal. 363, 28 Pac. 118.

13. Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470, per Finlayson, J.

14. Prey v. Stanley, 110 Cal. 423, 42 Pac. 908.

15. Bonnell v. McLaughlin, 173 Cal. 213, 159 Pac. 590; Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451.

16. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 9 A. L. R. 115, 186 Pac. 596. See infra, § 209.

that said parties, or either of them, shall not sell or hypothecate, mortgage, convey, or alienate the whole or any portion of said premises during their natural lives, but they may make testamentary disposition of the same," etc., is void as a restriction which is repugnant to the grant itself.[17]

A condition subsequent in a deed, forfeiting the title to the grantor in case of a breach of building restriction, is not repugnant to the granting clause, nor does it come within the terms of the code sections prohibiting or limiting restraints on alienation.[18]

§ 209. Sale to Person not of Caucasian Birth — Occupancy.—The provision in a deed that the property shall not be sold, leased or rented to any persons other than of the Caucasian race is a condition subsequent, a restraint on alienation and falls within section 711 of the Civil Code. Such a provision in a deed, limited both to persons of a particular class and to a comparatively brief period of time, cannot be upheld on the ground that the restraint is but partial, since there is no distinction in California between partial and general restraints upon alienation in view of section 711 of the Civil Code. The condition, however, that the property should not be occupied by a person not of Caucasian birth is in a different category. It is not a restraint upon the alienation, but upon the use of the property. There is no prohibition by statute of such restraints imposed by way of condition nor was there any at common law. Moreover, such a provision is not within the inhibition of the fourteenth amendment of the federal constitution, since such prohibition applies exclusively to actions by the state and has no reference to actions by individuals.[19]

17. Bonnell v. McLaughlin, 173 Cal. 213, 159 Pac. 590.

18. Firth v. Marovich, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729. See infra, § 210 et seq., as to restrictions upon use; and infra, § 214 et seq., as to building restrictions.

19. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 9 A. L. R.

Restraints upon Use as Conditions Subsequent.

§ 210. Uses Subject to Restraint.—The instances in which conditions restricting the use of property conveyed have been enforced are exceedingly numerous and the conditions enforced of almost every conceivable variety. Conditions so extreme as to restrain the use to a single specified purpose are not uncommon, and as a general rule are enforced.[20] Hence, it has been uniformly held that conditions inserted in deeds precluding the establishment of various occupations or industries—as, for instance, distilleries, machine-shops, livery-stables and saloons, or places where intoxicating liquors might be obtained—in certain specified localities intended for and desirable as places of residence, have been sustained. The purpose of such restrictions, generally speaking, is to free certain localities from offensive sights, disturbing noises, or noxious vapors.[1] In any event, courts will not enforce conditions for a dishonest purpose or for a purpose opposed to the public policy of the state, as where one by imposing such a condition seeks to obtain a monopoly of the sale of certain articles in a particular locality. And there can be no difference in this regard whether the business so sought to be centered in one person in a community is one acknowledged by everyone to be of great benefit to mankind, or one regarded by many good people of detriment to the community, provided both are lawful.[2] Since re-

115, 186 Pac. 596. See note, 9 A. L. R. 120, as to discriminating against persons on account of race, color or religion, as an unlawful restraint on the power of alienation.

20. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 9 A. L. R. 115, 186 Pac. 596.

1. Burdell v. Grandi, 152 Cal. 376, 125 Am. St. Rep. 61, 14 L. R. A. (N. S.) 909, 92 Pac. 1022. See infra, § 212, as to restrictions as to sale of intoxicating liquors. See note, 5 A. L. R. 1498, as to oil or gas or other mineral rights in land as affected by language in conveyance specifying purpose for which the property is to be used.

2. Burdell v. Grandi, 152 Cal. 376, 125 Am. St. Rep. 61, 14 L. R. A. (N. S.) 909, 92 Pac. 1022.

strictions as to use are a limitation on the title,[3] in common with conditions involving a forfeiture generally, they are strictly construed against the grantor and in favor of the grantee under the conveyance.[4]

§ 211. Distinction Between Restriction on Use and Restraint on Alienation.—There is a clear distinction between a restriction on use of the premises by the grantee in a deed conveying the fee, imposed by a condition or covenant whereby reasonable building restrictions are created, and a direct restraint on alienation.[5] While, doubtless, it is true that a restraint upon use is inconsistent with ownership in fee simple absolute, and that a restriction on use may narrow the circle of possible purchasers,[6] there is another reason that lies back of the rule respecting restraint on alienation that is not applicable to reasonable restraints on use, and that is that, ever since the statute quia emptores, courts and legislatures in the interests of the public have sought to strike the old feudal fetters from the power of alienation.[7] Restrictions against particular uses or modes of enjoying property held in fee are not favored and doubts will, in general, be resolved against them.[8] However, the rule against restraints on alienation does not apply to restrictions as to use or occupancy;[9] and where the intention of the parties is clearly manifested in the creation of such restrictions, they will be enforced in a court of equity.[10] And so, while a provision that property conveyed "shall not be sold, leased or rented to any persons other than of the Caucasian race," is void,[11] a provision

3. Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159.

4. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047. See supra, § 200.

5. Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470.

6. Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159.

7. See supra, § 207 et seq., as to restraint upon alienation.

8. Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622.

9. See supra, § 209.

10. Walker v. Haslett, 44 Cal App. 394, 186 Pac. 622. See infra, § 224 et seq., as to enforcement.

11. Gandolfo v. Hartman, 49 Fed. 181, 16 L. R. A. 277 (covenant

in a deed that no person or persons other than of the Caucasian race shall be permitted to occupy the property, is not a restraint upon alienation, but upon the use of the property, and is valid.[12]

§ 212. Restrictions as to Sale of Intoxicating Liquors.—The eighteenth amendment of the federal constitution is at present the basis of restraint upon the sale of intoxicating liquors.[13] Prior to the enactment of the federal law such restraint was often the subject of contract and it was the rule that restrictive conditions against the sale of liquors on lands conveyed, with provisions for reverter to the grantor for breach, when imposed for the benefit of other lands of the grantor, were valid.[14] It has been held that in the scheme of establishing a town or village, all conditions for forfeitures inserted in deeds to lots therein, solely for the purpose of restricting a lawful occupation, in order that the grantor might himself enjoy a monopoly in it, are against public policy and void.[15] But this rule was held not to apply where the evidence did not show that there was a design to create a monopoly.[16]

§ 213. Lands Granted for a Public Purpose.—Where a conveyance is a gift upon condition for a public purpose it

inserted in a deed prohibiting sale or transfer to a Chinaman is invalid, being violative of the fourteenth amendment to the federal constitution and also of the treaty with China).

12. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 9 A. L. R. 115, 186 Pac. 596 (holding also that the provision that the property shall not be occupied by a person not of Caucasian birth is not an unlawful discrimination against certain classes of citizens and within the inhibition of the fourteenth amendment of the federal constitution). See supra, § 200.

13. See INTOXICATING LIQUORS.

14. Los Angeles etc. Land Co. v. Marr, 178 Cal. 243, 173 Pac. 83; Burdell v. Grandi, 152 Cal. 376, 125 Am. St. Rep. 61, 14 L. R. A. (N. S.) 909, 92 Pac. 1022; Southern Pac. R. R. Co. v. Blaisdell, 33 Cal. App. 239, 164 Pac. 804; In re Bangle, 36 Cal. App. Dec. 308, 201 Pac. 968;

15. Burdell v. Grandi, 152 Cal. 376, 125 Am. St. Rep. 61, 14 L. R. A. (N. S.) 909, 92 Pac. 1022.

16. Southern Pac. R. R. Co. v. Blaisdell, 33 Cal. App. 239, 164 Pac. 804.

should be regarded with even greater consideration than if the grant were for the use and benefit of a private person.[17] And following the rule that a condition involving a forfeiture is construed most strictly against the grantor and in favor of the grantee,[18] it has been held that a provision in a deed to a county merely reciting that the land conveyed is "to be used as and for a county high school ground and premises," for the grantee, did not create a condition subsequent.[19] But where a deed of gift is made to a municipality for a public use, upon a condition that the lands granted shall be devoted to a use specified in the grant, it being provided that if the grantee cease to use the said premises for the purposes so specified the lands shall revert to and become the property of the grantor, his heirs, executors, administrators or assigns, the grant is upon a condition subsequent, and where such condition is broken by the failure to maintain and use such instrumentalities for the purpose designated, the lands will revert to the donor, his heirs or representatives as the deed contemplates.[20]

Deed to reclamation district.—Under a deed to a reclamation district for the purposes of reclamation only which provides that if the land shall cease to be used for such purposes the same shall revert to the grantor, and the interest of the grantee shall cease, the grantee has no right to use the land principally for other or different purposes; and if the reclamation district or its assigns should cease to use

17. Whitaker v. Regents of University of California, 39 Cal. App. 111, 178 Pac. 308.

18. See supra, § 200.

19. Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794. See Cooper v. Selig, 32 Cal. App. Dec. 604, 191 Pac. 983, holding that a grant of a strip of land to a city in absolute terms followed by the recital in the habendum clause that the premises were to be held "for the purpose of a public road," was a grant of the fee and not of an easement, and upon the abandonment of the road no change in the title was effected.

20. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047.

the land for the purposes specified, it would revert to the grantor or his assigns. Every presumption is against a forfeiture of the estate of the reclamation district, and the burden is on the party claiming that the land has reverted to the grantor to show clearly that the land has ceased to be used for the prescribed purpose of reclamation.[1]

Building Restrictions.

§ 214. Right Generally to Impose and Enforce Restrictions.—The grantor of property may dispose of it as he sees fit, imposing such restrictions upon its use as he chooses, his right to impose them being limited only to the extent that such conditions shall be imposed to effect a lawful purpose.[2] He has the right to define the injury for himself, and also for his grantees, as to the remaining lots in his tract, as such injury may result from a breach of the conditions stipulated by him, and the purchaser of any lot contracting with him must abide by his definition of what shall be deemed to be an injury to the balance of the land.[3] While restrictions against particular uses or modes of enjoying property held in fee are not favored, and doubts will, in general, be resolved against them,[4] where the intention of the parties as determined from the language of the restriction itself, considered in the light of the entire context of the instrument and the circumstances existing at the time when the covenant is made, is clearly mani-

1. Reclamation District v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638 (holding that the conveyance of land by a reclamation district, in which the right is reserved to use a part of the building on the premises for tools, does not show that the premises have ceased to be used for the purposes of reclamation, in violation of a clause of the deed restricting the conveyance to use for reclamation purposes only).

2. Burdell v. Grandi, 152 Cal. 376, 125 Am. St. Rep. 61, 14 L. R. A. (N. S.) 909, 92 Pac. 1022; Los Angeles Terminal etc. Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622.

3. Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622.

4. See supra, § 200, as to rule of construction.

fested in the creation of the restrictions, they will be enforced in a court of equity.[5] It is a rule, therefore, that a grantor, or any subsequent owner of any part of the remaining land for the benefit of which the restrictive covenant is made, may enforce the covenant when it is broken, and his right cannot be defeated by the opinion of any number of persons that the breach occasions no substantial injury.[6] In other words, it is not open to question that building restrictions of the kind contained in a deed are valid and enforceable at the suit of the grantor so long as he continues to own any part of the tract for the benefit of which the restrictions were exacted.[7]

Change in or alteration or restriction.—Where perpetual building restrictions were established upon an entire tract of land under a general building scheme, and various lots were sold and conveyed subject thereto, a subsequent agreement between the original owners of the unsold portion of the tract, by which it was attempted to change the restrictions and limit the time of their duration, is ineffective for that purpose, and hence it has been held that lots subsequently sold with reference to such an agreement are, notwithstanding it, subject to the original restrictions.[8]

§ 215. General Building Scheme.—Courts are slow to declare covenants imposing building restrictions burdens on the land, unless it appears that a general scheme of improvement was contemplated.[9] Restrictions on the use or mode of enjoyment of granted premises, made by the grantor in furtherance of a general plan of improvement,

5. See infra, § 224 et seq., as to enforcement.

6. Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622. As to breach of conditions as to building restrictions, see infra, § 215; and see infra, § 227, as to waiver of rights under building restrictions.

7. Firth v. Marovich, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729; Quatman v. McCray, 128 Cal. 285, 60 Pac. 855.

8. Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167.

9. Bresee v. Dunn, 178 Cal. 96, 172 Pac. 387.

when reasonable and within the policy of the law, are valid and enforceable.[10] Such covenants affect the whole tract and are binding on each lot in the tract, and run with the land for the benefit of other lots in the tract.[11] Following the principles above stated, a restrictive clause in a deed prohibiting the erection and maintenance of buildings of certain character on the land conveyed of a less value than a specified amount, and providing for a forfeiture of the grantee's interest in the event of a violation thereof, is a condition subsequent, the breach of which will defeat the grantee's title.[12]

A general building scheme for a tract of land has been held to have been created and established where a map of

10. Parker v. Kenworthy, 181 Cal. 783, 183 Pac. 950; Los Angeles etc. Land Co. v. Marr, 178 Cal. 243, 173 Pac. 83; Alderson v. Cutting, 163 Cal. 503, Ann. Cas. 1914A, 1, 126 Pac. 157; Firth v. Marovich, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729; Los Angeles etc. Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167; Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622. See note, 1 A. L. R. 329, as to prohibiting erection within stated distance of side line of lot.

11. Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167. But see Pythian Castle Assn. v. Daroux, 172 Cal. 510, 157 Pac. 594, where the particular covenant was held to be purely personal and not one that runs with the land. See COVENANTS, vol. 7, p. 729, (§§ 16, 19, 21 and 22), as to covenants running with the land generally; and see infra, § 216, as to rule that deeds must be a memorial of the conditions to satisfy the rule of covenants running with the land.

12. Alderson v. Cutting, 163 Cal. 503, Ann. Cas. 1914A, 1, 126 Pac. 157 (stating that the validity of such a restriction "is not open to question"). Los Angeles & Arizona Land Co. v. Marr, 187 Cal. 126, 200 Pac. 1051.

A condition subsequent is created by a deed which provides that the conveyance was made upon the conditions that no building except a private residence with the customary outbuildings shall be erected or permitted on the premises, and that such residence shall cost a specified minimum sum and that the buildings shall be located not less than a specified distance from the front line of the lot and that any breach of such conditions occurring after the delivery of the deed shall have the effect of forfeiting the title of the grantee and of his assigns and that the title shall thereupon revert to the grantor. Firth v. Marovich, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729.

the tract was filed expressly indicating the existence of such a building scheme, and a contract of sale and the deeds of several individual lots contained the same restrictive covenants and conditions, together with the statement that such restrictions were for the benefit of each lot in the tract, and that a breach thereof might be enjoined or prevented by any person owning property in the tract, with a provision for reverter upon breach, particularly where the nature of the improvements on the tract and the sale advertisements tended to establish such a scheme; and the fact that some lots were conveyed with different restrictions and others without restrictions did not prevent the establishing of such scheme or destroy its binding effect.[13] But where lots in the same relative position in a tract were conveyed to different purchasers by deeds dated several years apart, which contained restrictions prohibiting for a specified period from the date of the deed the erection of buildings within a limited distance of the front of the lots, and the construction or placing of a fence in front of the front line of any building, and also contained as to some of the deeds a restriction upon the minimum cost of any building, which latter restriction was omitted entirely in the other deeds, such facts, it has been held, did not justify a pleading that there was a uniform plan of restrictions for the benefit of all the lots.[14] And in an action by a vendee to enforce alleged restrictive building covenants claimed to have been provided for by a vendor under a general building plan for the subdivision and sale of a tract of land, and to cancel a conveyance claimed to have been made by the vendor to a subsequent vendee in violation of the same covenants, the existence of the covenants claimed cannot be implied from the mere making and filing of a map showing the different subdivisions, nor from

13. Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167.

14. Bresee v. Dunn, 178 Cal. 96, 172 Pac. 387.

the fact that the vendor sold lots in conformity therewith.[15]

§ 216. Deed as Memorial of Conditions.—A servitude running with the land in favor of one parcel and against another is not created where the owner of a tract of land sells a portion of it, exacting of the grantee restrictive provisions as to its use, but without a word indicating that the land conveyed is a part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of the land which is to be the dominant tenement.[16] It does not make any difference whether the grantor gave each of the grantees to understand, and each grantee did understand, that the restrictions were exacted as a part of a general scheme, if such understanding was not incorporated in the deeds, for the deeds constitute the final and exclusive memorials of the understandings between the parties.[17] There is sound reason for the rule. It is apparent that each deed must be construed as of the time it is given and not as of a later date. Its construction and effect cannot be varied because of deeds which the grantor may subsequently give to other parties. To hold otherwise would be to subject the first deed, given at a time when there was nothing to evidence any general plan of restrictions, to different constructions at different times. In this rule the California supreme court discredits those authorities which hold in effect that when it appears that the owner of a subdivided tract has sold various lots in it from time to time and in each conveyance has exacted restrictive covenants

15. Wilcox v. Varney, 39 Cal. App. 680, 179 Pac. 705.

16. Werner v. Graham, 181 Cal. 174, 183 Pac. 945; Berryman v. Hotel Savoy Co., 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677 (holding that restrictions in such case are merely personal covenants and that they may be released by quitclaim deed).

17. See COVENANTS, vol. 7, p. 732.

which, it is evident, when all the deeds are considered together, were exacted in accord with a common plan, it is enough, and that mutual equitable servitudes have been created, although in any single deed, taken by itself, there is nothing to indicate any intent to create such reciprocal rights.[18]

§ 217. Relation to Rule Against Perpetuities.—Upon the contention that building conditions and limitations are obnoxious to the rule against perpetuities, as an attempt to create an estate the vesting of which depends upon what may be a very remote contingency, far beyond the limitations of the rule against perpetuities, the appellate court, speaking through Mr. Justice Sloane, has said in effect: "If the remainder of the estate, after forfeiture of the precedent estate by condition broken, was to vest in a third person, this would be an attempt to create a conditional limitation, and, under our statute, might be within the rule against perpetuities." "But where there is no attempt to create a contingent estate in a third party, there being a reservation in the deed itself of a conditional reversion of the title to the grantor, his heirs or assigns, the condition is not void for remoteness, and further such conditions generally are exempt from the operation of the rule against perpetuities."

"There may be strong grounds in public policy against arbitrarily limiting and restricting the manner of use of real property for indefinite periods, which may extend far beyond the existing conditions which make such limitations reasonable and justifiable when created; but our courts have held that such limitations are not void, as against public policy, so long as there are parties in being capable of passing a complete and unlimited title, and not

18. Werner v. Graham, 181 Cal. 174, 183 Pac. 945, per Olney, J. See Parker v. Kenworthy, 181 Cal. 783, 183 Pac. 950, affirming judgment on authority of Werner v. Graham, supra, the facts being substantially the same. See also COVENANTS, vol. 7, p. 708; and, generally, see EASEMENTS.

obnoxious to the rule against suspending the power of alienation."[19]

Breach and Forfeiture.

§ 218. General Rules as to Compliance With Conditions. The general rule in respect to the performance of conditions precedent is that they must be strictly performed, unless a performance has been prevented or waived by the other party, or has been prevented by the act of God or the public enemy.[20] Under the equitable rule, a condition subsequent is, however, deemed satisfied by a substantial compliance therewith.[1] While it may be probable that there will be no breach of a condition subsequent, and therefore no forfeiture, nevertheless, a court is bound to assume that there may be such a breach;[2] and where it is clear that the condition has been violated or unfulfilled, the consequence is the forfeiture of the estate.[3]

Good faith in performing a condition is an element to be considered, and this rule is particularly applicable where the observance of the condition implies a voluntary

19. Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159. See generally, PERPETUITIES.

20. See CONTRACTS, vol. 6, p. 400.

1. Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 62 Pac. 295 (holding that a condition subsequent in a deed to a railway company that if the land conveyed is not used "for railroad purposes only" it is to revert to the grantors, without limiting or defining the extent of the use, or the character or frequency of trains to be operated over it, is not broken by an irregular use of the land for railroad purposes, ranging from daily use to use at intervals of several months); Whitaker v. Regents of University of California, 39 Cal. App. 111, 178 Pac. 308 (see infra, this section, as to good faith in the grantee); Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935 (stating the rule but holding that there was not such compliance in this case). See CONTRACTS, vol. 6, p. 401; and see FORFEITURES.

2. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097.

3. Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647. See Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794, where the breach relied upon was the conveyance of the property to another.

act on the part of the grantee.[4] Evidence of violation of a condition must be clear and satisfactory to justify a court in decreeing a reversion of the conveyance.[5]

"Double" or "duplex" house as violation of "residence" restriction.—A covenant or restriction in a deed that "no building or structure whatever, other than a first-class private residence," shall be erected on the premises, is violated by the construction thereon of what is commonly known as a "double" house, or a "duplex" or two-family residence, that can conveniently be used by two families living separate and apart from each other. A building planned and designed for the residence or place of abode of two families cannot properly be described as one residence; neither can it be deemed to be a "private" residence nor a "private" dwelling.[6] And it is immaterial whether the division of the house into two separate and distinct parts is horizontal or vertical.[7]

§ 219. Changed Conditions as to Use.—Under the rule that equity will not enforce all such covenants that may be desired, unless the facts of the case justify equitable relief,[8] the authorities support the proposition that where property has been deeded subject to residence conditions and restrictions and where there has been a change in the uses to which property in the neighborhood is being put, so that it is no longer residence property, it would be oppressive and inequitable to give effect to restrictions where

4. Whitaker v. Regents of University of California, 39 Cal. App. 111, 178 Pac. 308.

5. Whitaker v. Regents of University of California, 39 Cal. App. 111, 178 Pac. 308, citing to this point Reclamation Dist. v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638; Behlow v. Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295; and Randol v. Scott, 110 Cal. 590, 42 Pac. 976; and also citing Civ. Code, § 1442, to the rule of strict construction as against forfeitures. See supra, § 200.

6. Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622.

7. Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622. See note, 18 L. R. A. 451, as to multiple residence structures as violation of building restrictions.

8. See infra, § 229, as to relief in equity from forfeiture.

the changed condition of the locality has resulted from other causes than their breach.[9] The doctrine applies, however, only where the reason and justification for the restrictions have failed through changed conditions. "In other words, under such circumstances a court of equity may deny the relief sought. But the rule does not go to the extent of permitting parties whose land is subject to the legal restraint of such limitations to bring action to quiet their title against such contractual obligations, because of changed conditions. Contractual obligations do not disappear as circumstances change. It is only the granting of equitable relief and not the binding force of the restrictive covenant that is affected by a change in the conditions. . . . The mere fact that the property has become more desirable or valuable for business than for residence purposes, where the restriction, notwithstanding the change of conditions, still is of substantial advantage to the dominant property, will not necessarily defeat application for equitable relief."[10] Likewise, where no radical change is shown, but on the contrary, the evidence supports the finding that there has been no unfavorable change, but rather that the property has improved, the fact that apart from and surrounding a tract which has been restricted in the use thereof to residence purposes some business has grown up, and that the restricted land has become more valuable in consequence, will not entitle the owners of the unsold portion of the original tract to be relieved of the restrictions they created. This condition is but the natural result of the improvement of the various tracts, and the fact that the property may have

9. Los Angeles etc. Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308 (holding that in determining whether to enforce conditions or not the court will consider not only the effect which the use complained of would have upon the property of the one complaining of the breach, but also the effect upon the interest of the public); Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167.

10. Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159, per Sloane, J.

become more valuable thereby for business purposes is immaterial.[11]

§ 220. Re-entry—In General.—Title is divested only upon the re-entry of the grantor or those succeeding to his rights, for the condition broken, or by a suit for the recovery of possession, or other act equivalent to an entry.[12] The mere breach of conditions subsequent does not ipso facto effect a reverter of the title until the proper steps are taken to consummate the forfeiture.[13] Upon the entry of the grantor he becomes seised as of his first estate, and the estate of the grantee is terminated.[14]

Re-entry clause not an essential.—Where a conditional estate is created in the grantee, a re-entry clause is not essential to authorize the grantor to terminate the estate by re-entry after a substantial breach of the conditions,[15] nor is a formal re-entry a necessary prerequisite to the bringing of an action after breach of condition subsequent.[16] That a re-entry clause is not included in a conveyance is immaterial to the upholding of a reversionary interest if the language of the instrument plainly imports that the grant conveys only a conditional fee.[17] It has been held that a deed conveying land to a city with the proviso that the "conveyance is made and accepted upon

11. Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167.

12. Firth v. Los Angeles Pac. L. Co., 28 Cal. App. 399, 152 Pac 935. The act of re-entering is one mode by which a determination of the grantor to take advantage of the condition broken might be manifested. Firth v. Los Angeles Pac. Land Co., 28 Cal. App. 399, 152 Pac. 935.

13. Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222. Citing Ruch v. City of Rock Island, 97 U. S. 693, 24 L. Ed. 1101 (see, also, Rose's U. S. Notes); and Ferris v. Coover, 10 Cal. 589.

14. Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10; Fitzgerald v. Modoc County, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794.

15. Fitzgerald v. County of Modoc, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794; Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10.

16. See infra, § 228.

17. Martin v. City of Stockton, 39 Cal. App. 552, 179 Pac. 894,

the express condition, limitation and restriction'' that the city ''shall use said premises for excavation and as a waterway and drain only, and for no other purpose whatsoever,'' and with a covenant on the part of the city that it will bulkhead the sides of the channel as soon as excavated and maintain such bulkhead at its own expense, vests in the city a conditional fee and not merely an easement, and such deed leaves in the grantor a reversionary interest, which interest he may assert in the event of an abandonment of the purposes for which the conveyance was made, or of a failure to comply with the conditions, and insist upon forfeiture as fully and completely as though a re-entry clause had been specifically set forth in the instrument of conveyance.[18]

When re-entry may be made.—''Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided in sections 1161 and 1162 of the Code of Civil Procedure.''[19]

§ 221. Rule Under Common Law—Under Civil Law.—Under the common law, a breach of condition subsequent will not itself revest title to public or private lands granted upon such condition, without office found or a re-entry for the forfeiture.[20] Prior to April 13, 1850, the date of the adoption of the common law in California, the civil law prevailed,[1] under which no formal denouncement or re-entry was necessary for forfeiture to revest title in pueblo lands granted by an alcalde upon condition subsequent. The question of forfeiture under the civil law was required to be determined in view of the circum-

18. Martin v. City of Stockton, 39 Cal. App. 552, 179 Pac. 894.

19. Civ. Code, § 791. See FORCIBLE ENTRY AND DETAINER.

20. Norris v. Moody, 84 Cal. 143, 24 Pac. 37.

1. Norris v. Moody, 84 Cal. 143, 24 Pac. 37. See COMMON LAW, vol. 5, p. 255.

stances of the case, upon principles of right and wrong.[2] In a case where there was no attempt at any time to perform a condition subsequent in an alcalde grant, and nothing to prevent or excuse performance, and where an inexcusable breach of the condition had occurred long prior to the adoption of the common law in California, and for nearly forty years thereafter the grantee remained silent, asserting no claim to the property and allowing a subsequent grantee of the city to occupy and improve the premises without objection for thirty years of that time, and finally asserted a claim because of an issue of a patent for the pueblo lands of the city, it was held that all the right of the grantee under the grant had been forfeited and that the title had reverted in the pueblo prior to the adoption of the common law.[3]

§ 222. Transfer of Right of Re-entry.—It is a definitely settled rule in California that a grantor's right of re-entry or of repossession for breach of a condition subsequent is a right which can be assigned or devised either before or after breach of the condition.[4] The common-law rule that the benefit of a condition subsequent in a deed could be reserved only to the grantor and his heirs has been changed by section 1046 of the Civil Code, which provides that "A right of re-entry, or of repossession for breach of condition subsequent, can be transferred."[5] In a case where a deed of grant to a corporation was made conveying all right, title and interest of the grantor in a

2. Norris v. Moody, 84 Cal. 143, 24 Pac. 37; Touchard v. Touchard, 5 Cal. 306; Vanderslice v. Hanks, 3 Cal. 27. But see next note, infra.

3. Norris v. Moody, 84 Cal. 143, 24 Pac. 37 (and see discussion in this case of Touchard v. Touchard, 5 Cal. 306, Holliday v. West, 6 Cal. 519, and Hart v. Burnett, 15 Cal. 530, from which it appears that Touchard v. Touchard, 5 Cal. 306, and those cases holding to the rule therein declared were not overruled by the Holliday case). See generally, PUBLIC LANDS.

4. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047; Hannah v. Southern Pac. R. R. Co., 32 Cal. App. Dec. 819, 192 Pac. 304; Civ. Code, § 1046.

5. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047.

strip of land and to the successors and assigns of the grantee for the purposes of a railroad and the uses incidental thereto, and providing that if any portion of the land shall not be continuously used for such purposes, then such portions ceased to be used should be excepted from the grant and revert to the grantor, it was held that the right of the grantor under such deed to take advantage of a breach of the condition subsequent, was not transferred by a deed which merely contained the recital that the property described was conveyed subject to the reservation or exception of the strip.[6]

§ 223. Reconveyance and Reverter.—Section 1109 of the Civil Code contains this express provision:

"Where a grant is made upon condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record."[7]

Upon breach of the condition the occupant's right to occupy the premises is terminated, and it then becomes his duty, under section 1109 of the Civil Code, to reconvey the property. And since a reconveyance may be compelled where a grant has been made and the condition subsequent has been broken, it follows that upon a like breach of conditions subsequent as provided for in a contract to convey, the vendor may refuse to make the deed and he may quiet his title against the purchaser's claims under the contract.[8] A demand either to perform the conditions or to reconvey is not necessary to the prosecu-

6. Hannah v. Southern Pac. R. R. Co., 32 Cal. App. Dec. 819, 192 Pac. 304.

7. Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Liebrand v. Otto, 56 Cal. 242; Southern Pac. R. R. Co. v. Blaisdell, 33 Cal. App. 239, 164 Pac. 804; Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935.

8. Southern Pac. R. R. Co. v. Blaisdell, 33 Cal. App. 239, 164 Pac. 804.

tion of the action by the grantor to remove a cloud upon the grantor's title to the lands.[9]

Enforcement and Waiver.

§ 224. Parties Entitled to Benefit of Conditions.—A restriction in a deed of a lot expressly made for the benefit of other lots in the same tract is valid and enforceable by the owners of such other lots.[10] In general terms, the benefit of a condition in a grant is reserved to the grantor and his heirs without regard to the ownership of other property.[11] But where the grant contains a restriction in the nature of a covenant that has relation to a benefit to adjoining property, the restriction can only be enforced in favor of the title to such adjoining property. Where the complainant is not in any way interested in the benefit arising from the restriction or limitation placed upon the granted estate by the terms of the covenant contained in the deed, and will not be damaged by the failure to comply therewith, he is not in a position to maintain an action to enforce the restriction.[12] However, an estate in reversion left in a grantor by such a deed is sufficient foundation for the right of a residuary devisee to enforce a forfeiture by re-entry for breach of a condition subsequent.[13] The estate necessary to support the assignment in such case is sufficient foundation for the right asserted

9. Liebrand v. Otto, 56 Cal. 242. See QUIETING TITLE.

10. Alderson v. Cutting, 163 Cal. 503, Ann. Cas. 1914A, 1, 126 Pac. 757. And see cases cited supra, § 214 et seq.; in reference to building restrictions.

11. Los Angeles University v. Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262.

Whether the conditions of a deed are complied with or not, is matter between the grantor and grantee, with which third persons have nothing to do. Smith v. Brannan, 13 Cal. 107. And questions as to the performance of the conditions contained in a grant cannot be raised by a mere naked trespasser. Buckelew v. Estell, 5 Cal. 108.

12. Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

13. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047.

by the plaintiff in such an action.[14] Likewise, the owner of a contingent future estate in land is entitled in equity to enjoin a threatened destruction of the substance of that estate by the tenant in possession, in violation of the terms of conditions involving a forfeiture, whether such threatened destruction be total or partial, the rule being that such restrictions may be lawfully annexed to the conveyance of an interest less than the unqualified fee, and will be enforced at the suit of the holder of the future estate.[15] If, however, there is no reversion left in the grantor, the burden will not bind the successors in interest of the covenantor, there being in such case no privity of estate.[16]

§ 225. Grantees With Notice of Conditions.—Where a condition subsequent in a deed is attached to the title and runs with it against the grantee of a subsequent deed, who has constructive notice by the record of the deed, or actual notice that his title would be subject to the condition, he is bound by such condition, though the immediate conveyance to him does not recite the condition contained in the deed to the grantor.[17] Such covenants run with the land;[18] and the acceptance of a deed by the grantee binds him to any conditions upon which the delivery was made.[19] The presumption is that a grantee who person-

14. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047 (citing Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351, where the rule was applied to a decree). See Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097, holding that a contingent future interest of a grantor is alienable, and this right to sell his estate includes the right to transfer the means of protecting it.

15. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097 (action for damages by the successor in interest of the grantor against the successor in interest of the grantee).

16. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097; Bresee v. Dunn, 178 Cal. 96, 172 Pac. 387.

17. Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167.

18. Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167. See COVENANTS, vol. 7, p. 721.

19. Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Simons v. Bedell, 122 Cal. 341, 68 Am. St. Rep. 35,

ally accepts, retains and records a deed of conveyance, does so with knowledge of its contents.[20] It follows from the principles above stated that purchasers of lots in a tract subject to a general building scheme, although the deeds through which they deraigned title contained no restrictions, are chargeable with constructive notice of the restrictions created, where the sales were made with reference to a map expressly indicating the existence of a building scheme, and the deeds of their grantors by which the restrictions were created and established, together with such map, were placed of record, and where also the general appearance of the tract and improvements thereon indicated to one interested the presence of some character of restrictions.[1] But this rule does not apply where the covenants are purely personal and do not run with the land.[2]

§ 226. Restricted Covenants and Covenants not Running With the Land.—Where the covenant to improve property as specified purports to run solely "with the land conveyed," and no ownership of other land of the grantor is stated in the deed, a subsequent purchaser of the land conveyed cannot be charged from the record with knowl-

55 Pac. 3; Brannan v. Mesick, 10 Cal. 95.

A grantee is presumed to have knowledge of a covenant in a deed from the time he accepts the instrument. Dutton v. Locke-Paddon, 37 Cal. App. 693, 174 Pac. 674.

20. Emery v. Kipp, 154 Cal. 83, 129 Am. St. Rep. 141, 16 Ann. Cas. 792, 19 L. R. A. (N. S.) 983, 97 Pac. 17.

1. Miles v. Clark (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167; Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Miles v. Clark, (Hollingsworth), 44 Cal. App. 539, 187 Pac. 167. See note, 16 A. L. R. 1013, as to record of deed or contract for conveyance of one parcel with covenant or easement affecting another parcel owned by grantor as constructive notice to subsequent purchaser or encumbrancer of latter parcel.

2. See infra, § 226.

Personal covenants cannot have the same effect as covenants running with the land. Berryman v. Hotel Savoy Co., 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677. See COVENANTS, vol. 7, p. 742, § 26, as to enforcement in equity against persons giving notice of covenants.

edge that the original grantor owned other land to be benefited by the covenant, and has the right to construe the covenant as imposing no servitude running with the land, but as imposing a mere personal burden on the land conveyed which will adhere exclusively to the original covenantor. And in such case, it has been held, a subsequent deed of adjoining property with a similar restriction does not create reciprocal rights between the two grantees, enforceable in equity in favor of the second grantee, or his successor in interest, against the first grantee of the lot, or his successor in interest, either as covenants running with the land, or as personal covenants.[3]

Where a deed containing building restrictions merely provides that the property conveyed shall revert to "the grantor, his heirs or assigns," in case of a breach of the restrictions, such provisions, if conditions, cannot be enforced by other lot owners under deeds from the same grantor and containing the same restrictions, against a lot owner who, subsequent to his deed, obtained from the original grantor a quitclaim deed to all his interest in the lot, for such reversion clause runs in favor of the grantor only. The effect of the quitclaim deed in such case was to release the restrictive provisions as to such lot so far as it was in the power of the original owner so to do.[4] It is clear that this last stated case is but an application of the rule that conditions involving forfeitures are construed in favor of the grantee and against the grantor, for by that rule of construction a covenant running to "a grantor, his heirs and assigns," cannot, by the mere force of that expression, be expanded into a covenant running with the land.[5]

3. Berryman v. Hotel Savoy Co., 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677.

4. Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (holding that by "assigns" is meant the assignees of the reversion or right of re-entry).

5. See supra, § 200, as to the rule of strict construction. See COVENANTS, vol. 7, p. 1112, as to covenants to "heirs and assigns" not running with the land.

§ 227. Waiver of Right to Benefit of Conditions.—It is a general rule that a condition may not be enforced at the instance of one who has waived his right thereto.[6] Accordingly, a restriction in a deed prohibiting the erection and maintenance of buildings of certain character on the land conveyed, and providing for a forfeiture of the grantee's interest in case of violation thereof, may be waived by the grantor by his acceptance of the final payment for the land and his delivery of a deed thereto, with knowledge of the existence upon the land of a building coming within the restrictive clause.[7] And it has been held that a forfeiture provided for in a deed upon breach of conditions or restrictions against the carrying on of specified business thereon is waived by grants of adjoining portions of the tract by the same grantor, containing no conditions or restrictions.[8] The execution of an agreement by the grantor extending the time for the performance of a condition, but preserving in effect all of the agreements of the original deed, is not a waiver of the condition subsequent recited therein.[9] And the fact that buildings had been put on other lots in violation of a building restriction, without objection by the grantor or other lot owners, does not constitute a waiver of the right to damages where the owners had suffered no damage from such other violations.[10] Likewise, no waiver is effected by the receipt of interest on a note and mortgage given for part of the purchase price of property subject to building restrictions where the obligation to perform such conditions remains unfulfilled contrary to the promise of the grantee.[11]

6. Los Angeles & Arizona Land Co. v. Marr, 187 Cal. 126, 200 Pac. 1051; Union Trust & Realty Co. v. Best, 160 Cal. 263, 116 Pac. 737; Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Brown v. Wrightman, 5 Cal. App. 391, 90 Pac. 467.

7. Los Angeles & Arizona Land Co. v. Marr, 187 Cal. 126, 200 Pac. 1051.

8. Brown v. Wrightman, 5 Cal. App. 391, 90 Pac. 467.

9. Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935.

10. Alderson v. Cutting, 163 Cal. 503, Ann. Cas. 1914A, 1, 126 Pac. 157.

11. Quatman v. McCray, 128 Cal. 285, 60 Pac. 855.

XIII. ACTIONS AND PROCEDURE.

§ 228. Remedies and Procedure Generally.—Deeds in common with contracts generally may be set aside for fraud,[12] duress,[13] undue influence,[14] or for a want of consideration,[15] or for any other cause affecting their validity.[16] In California, actions may be maintained by or against executors or administrators in all cases in which they might have been maintained by or against their respective testators or intestates.[17] And so an action may be maintained by the representative to set aside a deed obtained from his intestate or testator through undue influence exercised by the grantee, and a tenant of the administrator, if sued for the possession of a mala fides purchaser from such grantee, may set up as a defense that the deed was obtained by undue influence.[18] It has been held that a cause of action to avoid the deed of a wife for the undue influence of her husband, and particularly for that form of undue influence which is presumed to have been exerted because of the confidential relation of the parties, is distinct from a cause of action to cancel it either for his duress or for his fraud in misrepresenting the property conveyed; and a cancellation cannot be had on account of such undue influence, under a complaint which merely alleges such duress and fraud.[19] In an early

12. See supra, §§ 101, 114. And see CANCELLATION OF INSTRUMENTS, vol. 4, p. 770 et seq.; CONTRACTS, vol. 6, p. 69; and FRAUD AND DECEIT, as to fraud in the procurement of contracts generally.

13. See supra, § 116. And see DURESS.

14. See supra, § 104 et seq. And generally, see CANCELLATION OF INSTRUMENTS, vol. 4, p. 777 et seq.; CONTRACTS, vol. 6, p. 70; FRAUD AND DECEIT.

15. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; Estate of Moxey, 2 Cof. Prob. Dec. 369. See supra, § 37 et seq.

16. See supra, § 99 et seq. See, also, QUIETING TITLE.

17. See Code Civ. Proc., § 1582. See EXECUTORS AND ADMINISTRATORS.

18. Doherty v. Courtney, 150 Cal. 606, 89 Pac. 434.

19. Tanforan v. Tanforan, 173 Cal. 270, 159 Pac. 709.

case it was held that an action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by a purchaser who has taken possession of the premises sold under a conveyance with express covenants, and that if a party takes a conveyance without covenants, he has no remedy in case of failure of title;[20] but this doctrine has been questioned when applied to cases of fraud.[1]

Deeds, like written contracts generally, are subject to revision or reformation, where, under the circumstances described in the code, they do not truly express the intention of the parties.[2] This subject is treated in another article of this work.[3]

§ 229. Relief in Equity from Forfeiture.—Although equity will relieve against a forfeiture for breach of a condition when the act may be performed afterwards or compensation can be made for it, yet unless a full compensation can be given, so as to put the party in precisely the same situation, equity will not interfere. If the act be willfully done, and the condition is for the performance of a collateral act, or one for which the court has no certain rule by which to measure the damages, beyond its own arbitrary judgment in the matter, equity will not relieve. The general equitable principle is here applicable that contracts or obligations of parties fairly and freely assumed will not be set aside merely because time may show that the obligation was onerous or unprofitable. The rule that equity will not enforce a forfeiture at suit of a party claiming it does not apply to an action to compel a reconveyance of land, and to remove a cloud upon the plaintiff's title, after his title has been revested by reentry for breach of a condition subsequent. Such an action is taken out of the ordinary rule of proceedings in

20. Peabody v. Phelps, 9 Cal. 213.
1. Wright v. Carillo, 22 Cal. 595.
2. See Civ. Code, § 3399.
3. See REFORMATION OF INSTRUMENTS.

equity, and is based upon the statutory right to a deed given by section 1109 of the Civil Code, which provides that "where a grant is made upon condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant duly acknowledged for record." The rule stated in section 3275 of the Civil Code, that when "by the terms of an obligation a party thereto incurs a forfeiture, . . . he may be relieved therefrom upon making full compensation, . . . except in case of grossly negligent, willful, or fraudulent breach of duty, if applicable at all to conditions either precedent or subsequent, can apply only when there is some measure or standard by which compensation may be estimated.[4] After condition broken, a grantor, on re-entry, may sue in ejectment for the property,[5] or for a reconveyance,[6] or, in a proper case, an action may be maintained for the cancellation of the deed and the quieting of his title.[7]

A formal re-entry upon the land is not a necessary prerequisite to the bringing of an action to quiet title after breach of condition subsequent.[8]

§ 230. Injunction to Restrain Breach of Conditions.— When clearly expressed, uniform restrictive covenants contained in deeds, executed pursuant to a general plan of improvement and development for the benefit of all the

4. Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702. See CONTRACTS, vol. 6, p. 401 et seq. And see FORFEITURES.

5. Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702 (stating the rules). See EJECTMENT.

6. Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702.

7. Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (action to quiet title against building restrictions); Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10; Liebrand v. Otto, 56 Cal. 242; Southern Pac. R. R. Co. v. Blaisdell, 33 Cal. App. 239, 164 Pac. 804; Firth v. Los Angeles Pac. Land Co., 28 Cal. App. 399, 152 Pac. 935. See CANCELLATION OF INTRUMENTS, vol. 4, p. 756; QUIETING TITLE.

8. Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935. See supra, § 220.

lots in a tract, will be strictly enforced, and a court of equity will decree an injunction, against a grantee or his assigns bound to such covenants, and this without any showing of actual damage or substantial injury.[9] And equity will enjoin the use of a property by a grantee or his assigns where such use is subversive of a condition upon which conveyance of the property was made.[10] But injunction will not lie as against a subsequent grantee where, by a prior quitclaim deed to his grantor, the restriction had been effectively removed and where it appeared that the parties to the covenant did not intend to create an easement for the benefit of any succeeding grantee, or for the benefit of any land whatever.[11] The decree, when injunction is awarded, may be without prejudice to the right of the defendant to move, at any time thereafter, for a modification or dissolution of the injunction should future changes in the condition of the neighborhood entitle defendant to such modification.[12] Where the complaint states a cause of action for damages and for an injunction, the fact that the equitable remedy may be or has been denied does not necessarily affect the plaintiff's right to damages.[13] Of course, in an action to enjoin a use of property in violation of alleged building restrictions, a judgment of nonsuit is properly granted where there is no evidence of any restrictions having any reference to the land involved.[14]

§ 231. Pleading "Execution" of Deed—Breach and Performance of Conditions.—It is a general rule that an allegation in a pleading of the "execution" of a deed includes delivery,[15] unless the context indicates that the term was

9. Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622. See INJUNCTIONS.

10. Pavkovich v. Southern Pac. R. R. Co., 150 Cal. 39, 87 Pac. 1097.

11. See Berryman v. Hotel Savoy Co., 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677.

12. Walker v. Haslett, 44 Cal. App. 394, 186 Pac. 622.

13. Alderson v. Cutting, 163 Cal. 503, Ann. Cas. 1914A, 1, 126 Pac. 157.

14. Wilcox v. Varney, 39 Cal. App. 680, 179 Pac. 705.

15. Campbell v. Genshlea, 180

used in a narrower sense, as in sections 1185, 1186, 1189, 1190 and 1191 of the Civil Code.[16] Accordingly, it has been held that where it was the theory of the plaintiff in an action for the cancellation of deeds that there had been no effective deliveries of the instruments, it was not error to permit an amendment of the complaint in striking out the words "and executed," after announcing the decision for the plaintiff but before entry of the judgment, and where it was clear that the averment as to "execution" was used inadvertently and not in its technical sense as importing delivery.[17]

An allegation in a complaint that if a person named as grantor in a deed "ever signed or acknowledged said instrument, he was forced and unduly influenced to do so by the defendant; and he had not . . . sufficient strength of mind or body to execute or deliver the said deed, or to understand its provisions or covenants, and the said deed never was delivered . . . to the defendant," has been held to be a sufficient allegation of the nondelivery of the deed, and upon being denied by the answer, presents an issue on that question.[18] If the complaint in an action to establish a constructive trust under a deed on the theory that there had been no delivery thereof, fails sufficiently to allege a nondelivery of the deed, then it may be assumed, in considering the pleading most strongly against the pleader,

Cal. 213, 180 Pac. 336; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054 (rule stated as to written instruments generally, and applied the execution of a mortgage). See Code Civ. Proc., § 1933. See supra, § 48 et seq.

This rule applies also to a finding. See infra, § 238.

16. Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054. See ACKNOWLEDGMENTS, vol. 1, p. 237, for the use of the term "executed" in a special and limited sense.

17. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336 (citing Clark v. Child, 66 Cal. 87, 4 Pac. 1058; Joseph v. Dougherty, 60 Cal. 358; and Bagley v. McMickle, 9 Cal. 430). See PLEADING, as to theory of case.

18. McGrath v. Hyde, 81 Cal. 38, 22 Pac. 293. See Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348, for complaint held sufficient as to averments showing conveyance made without consideration.

that there was some sort of a delivery of the instrument, qualified or otherwise.[19]

Averring breach of conditions.—A complaint of the grantor, in an action to cancel a deed, and to quiet his title against the grantees, has been held to state a sufficient cause of action, if it sets forth the deed and the conditions contained therein, and shows a total breach thereof for a specified number of years, an entire abandonment of the premises by the grantees, and that the plaintiff is in possession thereof.[20] A complaint averring compliance with building restrictions as a condition is sufficient as against a general demurrer, where it follows an interpretation of the condition which was adopted by the grantee and acted upon by all the parties in interest.[1]

Performance of conditions.—The mode provided for the pleading of the performance of conditions precedent generally is pointed out in another article of this work.[2] But in an action involving conditions subsequent, i. e., to enjoin breach of building restrictions, it has been held that an allegation in the complaint that at all times prior to the acquisition of title by defendants "the said building restrictions upon said lots have been faithfully observed" amounted to a mere conclusion.[3]

§ 232. **Evidence Generally.**—The rules of evidence governing in trials involving the validity of deeds are not essentially different from those applicable to written instruments generally. Hence, matters here stated touching upon certain phases of the more general subject[4] must be

19. Fisher v. Fisher, 23 Cal. App. 310, 137 Pac. 1094.

20. Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 790 et seq.

1. Quatman v. McCray, 128 Cal. 285, 60 Pac. 855.

2. See CONTRACTS, vol. 6, p. 402.

3. Bresee v. Dunn, 178 Cal. 96, 172 Pac. 387. See Elliott v. Merchants' Bank & Trust Co., 21 Cal. App. 536, 132 Pac. 280, where it is stated that parties cannot claim judgment upon an allegation of delivery of a deed upon condition where they have denied such allegation.

4. See infra, this section, as to issues involving the validity of

supplemented by references to other subjects of this work.[5] Speaking generally, evidence is admissible as to the capacity or incapacity of the grantor to make a deed,[6] or touching upon his mental and emotional condition at or about the time of its execution,[7] or as to fraud affecting the validity of a deed,[8] or duress or coercion,[9] or undue

deeds; infra, § 233, as to deed as evidence; and infra, § 236, as to declarations in respect to deeds.

5. See ALTERATION OF INSTRUMENTS, vol. 1, p. 1089 et seq; BOUNDARIES, vol. 4, p. 414 et seq.; CANCELLATION OF INSTRUMENTS, vol. 4, p. 796; EVIDENCE; FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCES; QUIETING TITLE; RECORDS; REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE; TRUST DEEDS.

6. Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Smyth v. Fitch, 32 Cal. App. Dec. 228, 190 Pac. 1049 (holding that an order restoring the grantor to competency, which was admitted in evidence without objection, was sufficient to support the finding as to her capacity); Estate of Moxey, 2 Cof. Prob. Dec. 369.

Where a question of mental incompetency is involved, although it relates primarily to the time when the act was performed, yet evidence of the mental condition of the grantor before and after the execution of the deed is competent as bearing upon that question, and the question is one of fact to be determined by the trial judge, who is the exclusive judge of the credibility of the witnesses. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

The fact that one drawing a deed and taking the acknowledgment sustained the relation of attorney to the grantor does not render him incompetent within section 1881 of the Code of Civil Procedure, to testify to his observation of the grantor's mental capacity at that time. Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312; Springer v. Springer, 6 Cal. Unrep. 662, 64 Pac. 470 (implied).

7. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561 (as to admissibility of evidence of a grantor's mental condition); Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148.

8. Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892.

In cases of fraud, actual or constructive, no mere form of words which the parties have made use of can shut out inquiry as to the real facts. And this from the necessity of the case. For, as has been pertinently asked, if parol evidence be not admissible, how else can the fraud be shown. Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689. And see the following cases where the issue of fraud was involved; Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086; Worthley v. Worthley, 33 Cal. App. 473, 165 Pac. 714; Estate of Moxey, 2 Cof. Prob. Dec. 369. See FRAUD AND DECEIT.

9. Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183.

influence,[10] or as to want of consideration,[11] or as to the fact of delivery or nondelivery thereof.[12]

§ 233. Deed as Evidence.

"Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof."[13-14]

The presumption is that a grantee who personally accepts, retains and records a deed or conveyance does so with knowledge of its contents.[15] But if the deed is not acknowledged it must be proved according to the ordi-

10. Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Ferguson v. Ash, 27 Cal. App. 375, 150 Pac. 657; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289.

In the trial of an action challenging the validity of a deed procured by a person standing in a confidential relation, and alleging undue influence, much latitude is allowed in the admission of evidence, and the courts necessarily are liberal in admitting evidence as to acts, conduct and expressions by the person who is claimed to have been mentally incompetent. Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 796.

11. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Estate of Moxey, 2 Cof. Prob. Dec. 369. See supra, § 37 et seq., as to the consideration of a deed and recitals in reference thereto as evidence.

A question as to whether there was consideration for the deed is permissible where it manifestly refers to a certain species of consideration. Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348.

12. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806.

Delivery or nondelivery of a deed is always a question of fact to be found from the surrounding circumstances of each transaction. Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736.

13-14. Code Civ. Proc., § 1951; Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086; Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7. See note, 6 A. L. R. 1437, as to recital in ancient deed, as evidence of facts recited against stranger to title. And see ACKNOWLEDGMENTS, vol. 1, p. 231.

15. Emery v. Kipp, 154 Cal. 83, 129 Am. St. Rep. 141, 16 Ann. Cas.

nary rules of evidence.[16] The objection to the reception of a deed in evidence, that the grantor had conveyed to another person his interest in the property granted, before the execution of the deed in question, is not tenable—such objection goes to its effect after it has been received in evidence, and not to its reception.[17]

Evidence consisting of contracts of sale, deeds, statements to purchasers, advertisements and announcements of the defendants, may be held sufficient to support a finding of the trial court that the restrictions and building scheme upon which certain of the parties based their claim were fully established, and were made binding upon every lot in the tract.[18]

"A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed."[19]

§ 234. Parol Evidence as to Deed Generally.—It is not competent to control a deed by parol evidence where it has taken effect by delivery.[20] So far as a deed is intended

792, 19 L. R. A. (N. S.) 983, 97 Pac. 17.

The acceptance and recording of a deed is competent evidence tending to show what land the grantee claimed as his. Valentine v. Jansen, 1 Cal. Unrep. 525. But see Anderson v. Hancock, 61 Cal. 88, implying that a deed will not be received in evidence where it shows erasures unexplained.

16. Landers v. Bolton, 26 Cal. 393. See EVIDENCE.

17. Peck v. Vandenberg, 30 Cal. 11.

18. Miles v. Clark, 44 Cal. App. 539, 187 Pac. 167. See supra, § 215, as to uniform building scheme.

19. Code Civ. Proc., § 1928.

A deed executed by several persons by their attorney in fact is admissible in evidence upon a showing that the power was executed by the grantors. Spect v. Gregg, 51 Cal. 198.

20. Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; McLaughlin v. Phillips, 31 Cal. App. Dec. 818, 189 Pac. 788; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664.

to pass or extinguish a right, it is the exclusive evidence of the contract, and a party is concluded by its terms; but it is not conclusive evidence of the existence of facts acknowledged in the instrument, such as its date,[1] acknowledgment,[2] consideration,[3] delivery, etc.[4] This is a transcription of the rule that wherever a right is vested or created, or extinguished, by contract or otherwise, and a writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal and common-sense construction of the instrument; but where the writing is used as evidence of a fact and not as evidence of a contract or right, it is susceptible of explanation by extrinsic circumstances or facts.[5] And in case of a latent ambiguity all the facts and circumstances surrounding the transaction are relevant and pertinent for the purpose of its solution.[6] Accordingly, evidence is admissible to prove that a deed, although absolute in form, created a constructive trust,[7] or that it was intended to be a mortgage,[8] or that, by a delivery of a deed, the grantor intended, or that he did not intend, to divest himself of the title.[9] But where a provision in a deed creates a mere personal covenant on the part of the grantee, and is not a condition subsequent, parol evidence is inadmissible to

1. See supra, § 19, as to date.

2. See ACKNOWLEDGMENTS, vol. 1, p. 255, as to conflict between date of deed and date of certificate of acknowledgment.

3. Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Peck v. Vandenberg, 30 Cal. 11. See Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984 (holding acts which the deed gives the grantee a right to do, and which are done under the deed, do not make a case of part performance of an oral agreement for a trust). See supra, § 47.

4. Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806. And see supra, § 73 et seq., as to presumptions and evidence generally of delivery. See note, 11 A. L. R. 1174, as to parol evidence to show that sealed instrument was delivered subject to condition.

5. See EVIDENCE.

6. Piper v. True, 36 Cal. 606. See EVIDENCE.

7. See infra, § 235.

8. Peck v. Vandenberg, 30 Cal. 11; Cunningham v. Hawkins, 27 Cal. 603. See MORTGAGES.

9. Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806. See supra, § 52, as to the intention of the grantor.

show that a condition subsequent was intended to be created.[10]

§ 235. Parol Evidence to Establish a Constructive Trust. Parol evidence is admissible to establish a constructive trust under a deed,[11] though absolute in its terms,[12] the statutory provision declaring that a trust in lands can only be created by an instrument in writing[13] having no application to such trusts.[14] A constructive trust is created where a conveyance is obtained by fraud or undue influence,[15] or where there had been no valid delivery of the deed.[16] The authorities are uniform to the point that to justify a court in determining from oral testimony that a deed which purports to convey land absolutely in fee simple was intended to be something different, as a mortgage or trust, such testimony must be clear, satisfactory and convincing, something more than that modicum of evidence which appellate courts sometimes hold sufficient to warrant a finding where the matter is not so serious as

10. Hawley v. Kafitz, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248.

11. Cooney v. Glynn, 157 Cal. 587, 108 Pac. 506; Bollinger v. Bollinger, 154 Cal. 699, 99 Pac. 196; Crabtree v. Potter, 150 Cal. 710, 89 Pac. 971; Nordholt v. Nordholt, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Sanguinetti v. Rosen, 12 Cal. App. 629, 108 Pac. 560.

Perhaps the most comprehensive and philosophical expression of the rule is, that parol evidence is admissible to raise a trust in cases of actual or constructive fraud. Isenhoot v. Chamberlain, 59 Cal. 637.

12. Redhead v. Payne, 38 Cal. App. 685, 177 Pac. 298.

13. See Civ. Code, § 852.

14. Crabtree v. Potter, 150 Cal. 710, 89 Pac. 971; Smith v. Mason, 122 Cal. 426, 55 Pac. 143. See TRUSTS.

15. Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543.

16. Fisher v. Fisher, 23 Cal. App. 310, 137 Pac. 1094 (holding that if the complaint in such action fails sufficiently to allege a nondelivery of the deed, then it may be assumed, in considering the pleading most strongly against the pleader, that there was some sort of a delivery of the instrument, qualified or otherwise).

It has been said that the existence of a confidential relation will not raise presumption that a deed was not intended as an absolute conveyance. Lynch v. Lynch, 22 Cal. App. 653, 135 Pac. 1101. See TRUSTS.

the overthrow of a clearly expressed deed, solemnly executed and delivered.[17] But whether the evidence in any case is "clear, satisfactory and convincing" must be determined by the trial court, and its determination thereon will be accepted on an appeal as conclusive.[18] The general rule above stated is limited by the rule that an absolute conveyance of lands cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto.[19]

§ 236. Declarations.—Declarations by the maker made subsequent to the execution of a deed are admissible as showing his state of mind. Such declarations need not be part of the res gestae, but are admissible because from a fair inference from all the circumstances they show the state of the party's mind at the time of the execution of the deed, his susceptibility to influence and his relations with those around him and the persons who are beneficiaries of his bounty.[20] But the declarations of a grantor made after his conveyance cannot be received to disparage his deed.[1] And the declarations of a party to an instrument, whether before or after its execution, are generally inadmissible in evidence, either to support or to destroy the validity of an instrument or to control its construction,[2] or to modify or change the terms of the document

17. Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543.

A deed absolute in form by a husband to his wife in consideration of love and affection must be construed to have the legal effect of its terms, unless it is clearly and satisfactorily shown by a preponderance of evidence that there was an oral understanding that it was to be held in trust. Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797.

18. Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797.

19. Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797.

20. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561.

1. Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303 (statements of a deceased husband concerning the title to the property made after the execution of the conveyance to his wife are inadmissible against the wife).

2. President of Bowdoin College v. Merritt, 75 Fed. 480 (citing,

itself,[3] or to show that the delivery of the deed to the grantee was subject to any condition not expressed therein.[4]

§ 237. Presumptions—Burden of Proof.—Various presumptions arising upon the execution of deeds have been considered in other portions of this article. And these presumptions are to be taken into account in determining many of the questions pertaining to the burden and sufficiency of proof. Certain of such presumptions relate to the capacity of the grantor,[5] the consideration,[6] delivery and transfer of the deed,[7] the possession of the grantee,[8] and the record.[9] Others relate to the date of the instrument,[10] or the exercise of fraud or undue influence upon

among other authorities, Mowry v. Heney, 86 Cal. 471, 25 Pac. 17).

Where the notary in narrating the husband's instruction to him stated that he said that the wife's deed should not have been recorded, and that it was recorded by mistake, the court properly struck out such evidence, as a self-serving declaration, not made in plaintiff's presence, and as not competent to prove that fact. Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348.

3. Yuba Inv. Co. v. Yuba Consol. Gold Fields, 184 Cal. 468, 194 Pac. 19 (citing Civ. Code, § 1625). See Wright v. Carillo, 22 Cal. 595, where, in an action to quiet title and upon the issue as to the genuineness of a deed purporting to have been executed by the defendant, his declarations to a third person in the nature of admissions and tending to show that such a deed had actually been executed by him, but that he was probably mistaken as to the name of the grantee, were held to be admissible.

4. Mowry v. Heney, 86 Cal. 471, 25 Pac. 17. See EVIDENCE, as to declarations, and admissions generally.

5. See supra, § 23.

6. See supra, § 45.

7. See supra, § 73.

8. See supra, § 74.

Possession of the deed as grantee therein constitutes a prima facie showing of its delivery. Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806 (citing Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.)

9. See supra, § 83.

In the absence of contrary proof, an authenticated copy of the record of a deed is sufficient proof to establish the fact of its delivery. Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7; Anthony v. Chapman, 65 Cal. 76, 2 Pac. 889.

10. See supra, § 85.

A grant duly executed is presumed to have been delivered at its date. Civ. Code, § 1055.

the grantor by the grantee where the latter occupies some confidential relation to the grantor.[11]

The burden is upon the grantor to prove a failure to perform the conditions in order to effect a forfeiture.[12]

§ 238. Findings and Decree.—As in the case of pleading "execution" of a deed,[13] a finding that a deed was executed imports a delivery thereof,[14] unless it is clear from the context that the word was used in a special or restricted sense.[15] The general rule that the findings or verdict of a trial court will not be disturbed on appeal when there is a substantial conflict of evidence on material points and when there is some evidence to support the verdict or findings[16] is applicable in actions upon deeds, and issues of fact involved therein.[17] But a finding contrary to the

11. See supra, § 108 et seq.

In a case involving a gift inter vivos based on a consideration of love and affection, where the donee is a son or daughter having the control or direction of the donor, a strong presumption of confidential relation arises which places upon the beneficiary the burden of showing fairness in dealing and full understanding on the part of the person parting with the property. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289. In the absence of such showing the conveyance is presumed to have been obtained by undue influence. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561. But undue influence will not be presumed in any transaction between husband and wife from the mere existence of the marital relation; nor will the want of consideration of a conveyance of the wife to the husband raise a presumption of undue influence from the mere fact of the marital relation alone. Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348. See COMMUNITY PROPERTY, vol. 5, p. 314, as to presumption in case of conveyances directed to husband, and same article, p. 315 et seq., as to presumptions where the property is conveyed to the wife.

12. Quatman v. McCray, 126 Cal. 285, 60 Pac. 855; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222.

13. See supra, § 231.

14. Callahan v. James, 7 Cal. Unrep. 82, 71 Pac. 104 (where the finding as to delivery was inferred);

15. Dean v. Parker, 88 Cal. 283, 26 Pac. 91.

16. See APPEAL AND ERROR, vol. 2, p. 921 et seq.

17. Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868; Reclamation Dist. v.

evidence and based merely upon presumptions cannot be sustained.[18] Within the general rule above stated, it has been held, in an action involving an issue of forfeiture for an alleged breach of a condition of use of the property conveyed for reclamation purposes, that where the evidence shows that the work of reclamation was not ended, and that use was still made of the land by the reclamation district, a finding that the land has never ceased to be used for reclamation purposes was sufficiently supported.[19] And where, upon the question as to whether a restriction was a covenant or a condition as to a subsequent grantee, the court finds in a suit to enjoin the breach of the restriction, and upon the evidence adduced, that the restriction had been effectively removed by a quitclaim deed for value by the original grantors, such finding will be sustained.[20] Where recitals of consideration in a deed are at variance with evidence aliunde the deed, a finding of consideration in accordance with the recitals of the deed will not be disturbed.[1]

Van Loben Sels, 145 Cal. 181, 78 Pac. 638; Neely v. Buster, 34 Cal. App. Dec. 183, 195 Pac. 736; Thielen v. Thielen, 41 Cal. App. 312, 182 Pac. 806; Fox v. California Fruit Co., 45 Cal. App. 475, 187 Pac. 971; Griffin v. Long, 21 Cal. App. 308, 131 Pac. 760.

18. Frankel v. Deidesheimer, 2 Cal. Unrep. 768, 15 Pac. 429.

In an action to enforce a forfeiture of title to real property because of the defendant's alleged breach of a condition subsequent in a deed, the finding to the effect that the defendant's grantor transferred to plaintiff its right to sue for forfeiture of defendant's lot, is without support in the evidence. Los Angeles & Arizona Land Co. v. Marr, 187 Cal. 126, 200 Pac. 1051.

See JUDGMENTS, as to the rule, generally.

19. Reclamation District v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638.

20. Berryman v. Hotel Savoy Co., 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677 (finding that covenant was intended for the benefit of an entire tract of land held not to be ambiguous when read as a whole).

1. Farnham v. Huston, 39 Cal. App. 687, 179 Pac. 701.

A finding that a deed "was executed for a good consideration passing from the" grantee to the grantor, has been held to be sufficient on the question of consideration. Lieman v. Golly, 178 Cal. 544, 174 Pac. 33.

It has been said in an action involving a consideration of the Torrens Land Title Act[2] that while under the act reference may be had to records of deeds, nevertheless, as to a title under a deed limited and qualified by many covenants contained therein, the purpose contemplated would be far better subserved if the decree in specific language set forth the conditions, restrictions, reservations and liens to which the court found the title to be subject, rather than by reference.[3]

2. Stats. 1915, p. 1932.

3. In re Bangle, 36 Cal. App. Dec. 308, 201 Pac. 968.

(H. L. D. and J. G. J.)

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I. INTRODUCTORY.

§ 1. Definitions and Distinctions.—"A deposition is a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine."[1] The Code of Civil Procedure specifies three modes in which the testimony of a witness is taken,—by affidavit, by deposition, and by oral examination.[2] The circumstance of giving notice to the adverse party and allowing him an opportunity to cross-examine the witness, distinguishes a deposition from an affidavit, which is "a written declaration, under oath, made without notice to the adverse party."[3] The codes, it may be noticed, give to the word "depose" a broader significance than to the correlative word "deposition," "depose," including every mode of written statement under oath.[4] The shorthand notes made by a reporter of a witness' testimony, or a transcript of them not read over to or signed by the witness and not authenticated in any way, do not constitute a deposition.[5] And a mere letter is neither an

1. Code Civ. Proc., § 2004.

2. Code Civ. Proc., § 2002. As to oral examination, see WITNESSES. As to affidavits, see AFFIDAVITS, vol. 1, p. 650.

3. Code Civ. Proc., § 2003. See "AFFIDAVITS," vol. 1, pp. 650, 652.

4. Pol. Code, § 17; Code Civ. Proc., § 17; Pen. Code, § 7.

5. Thomas v. Black, 84 Cal. 221, 23 Pac. 1037; People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

affidavit nor a deposition.[6] A deposition, it has been said, is a mere substitute for the personal appearance of the witness in court.[7] And the taking of a deposition is as clearly one of the "proceedings" of the court, as was the taking of testimony before the master or examiner in a suit in equity.[8] The taking of a deposition consists of the examination of the witness, reducing it to writing, and the signing of the same by the witness.[9]

§ 2. Scope of Article.—The present article deals with depositions as narrowly defined in section 2004 of the Code of Civil Procedure.[10] It therefore excludes affidavits.[11] The testimony of witnesses taken before a magistrate in preliminary proceedings in criminal cases, though reduced to writing and authenticated in the manner provided in the Penal Code, and commonly styled "depositions," does not fall within the purview of the present article, having already been fully treated elsewhere in this work.[12] But depositions otherwise taken for use in criminal trials are here considered.[13] The so-called depositions taken at coroners' inquests,[14] depositions taken upon granting continuances,[15] and depositions preceding the issuance of search-warrants,[16] and upon probation proceedings,[17] are dealt with under more appropriate heads. So also the taxing of expenses of taking of depositions as costs,[18] and the use, in subsequent trials, of a transcript of the testimony

6. Jones v. Duchow, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256.

7. Mitchell v. Haggenmeyer, 51 Cal. 108.

8. See infra, § 4.

9. Consolidated Lumber Co. v. Fidelity etc. Co., 161 Cal. 397, 119 Pac. 506. See infra, §§ 16–21.

10. See supra, § 1, where section 2004 of the Code of Civil Procedure is quoted.

11. See AFFIDAVITS, vol. 1, p. 650.

12. See CRIMINAL LAW.

13. See infra, §§ 41–47.

14. See CORONERS, vol. 6, pp. 546, 547.

15. See CONTINUANCE, vol. 5, p. 1006.

16. See SEARCH AND SEIZURE.

17. Pen. Code, § 1204. As to probation generally, see CRIMINAL LAW.

18. As to costs generally, see COSTS, vol. 7, p. 285.

given by a witness at a former trial, which is permitted under certain circumstances,[19] are also considered in another place.

§ 3. Survey of California Law.—Originally, courts of common law had no power to take depositions, and this lack was one of the defects in the administration of justice which compelled a resort to equity. In equity, however, all testimony was originally taken in this way. For that purpose a commissioner, usually styled an "examiner," was appointed by the court, to take the answers of the witness to interrogatories settled by the court. The witnesses were compelled by subpoena to attend and submit to examination, the subpoena being issued by the court itself. Disobedience was punished as a contempt. Taking depositions was one of the most ordinary and frequent proceedings in a court of equity, and the practice was controlled by the rules of court. The provisions of the Code of Civil Procedure relating to the taking and use of depositions constitute a system of procedure similar in all essential particulars to the method formerly used by courts of equity. The differences are neither important nor significant. Instead of requiring a court order, always given as of course, and leaving the appointment of the examiner to the court, the statute authorizes depositions, alike in law as in equity, and itself provides the examiners by giving that authority to any officer authorized to administer oaths. In fact, the statutory plan is a substitute for the procedure in courts of chancery, and includes all causes for which depositions were formerly authorized in equity practice.[20] It was the intention of the legislature, in providing for the taking of depositions, to amplify the remedy previously afforded by courts of equity, and in view of this tendency in legislation, the right to take depositions should be upheld in any case which falls at once

19. See EVIDENCE.

20. Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

within the principle on which the jurisdiction in equity was founded.[1] It was formerly held that the taking of depositions, being a mere privilege conferred by statutes in derogation of the common law, must be done in rigid conformity to the statute, or the depositions would be inadmissible in evidence.[2] But this rule is now without force in California, in view of section 4 of the Code of Civil Procedure, expressly abolishing the rule of strict construction of its provisions.[3]

II. AUTHORITY TO TAKE.

§ 4. Function in General.—It is a primary rule that the person taking a deposition must be one authorized by law.[4] The taking of a deposition is a part of the proceedings in the court for whose use the evidence is sought to be taken,[5] and where the judge himself is acting, it is a proceeding before him. Under such circumstances, the judge does not act as a mere ministerial functionary, but in the discharge of his duty as a judge, and he is armed with all the powers of a judge in chambers.

"To take evidence in the form of depositions is a function which while it may, for the sake of convenience, be sometimes delegated to notaries and other nonjudicial officers, is nevertheless more especially the function of the judge before whom a cause is pending in which the depositions may be required. The taking and certifying of depositions by a notary is strictly analogous to the taking and reporting of testimony by a referee. It is a portion of the judicial function that may be delegated; and as long

1. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 359.

2. Lezinsky v. Superior Court, 72 Cal. 510, 14 Pac. 104; Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183; Dye v. Bailey, 2 Cal. 383; McCann v. Beach, 2 Cal. 25.

3. Bollinger v. Bollinger, 153 Cal. 190, 94 Pac. 770. See STATUTES.

4. King v. Green, 7 Cal. App. 473, 94 Pac. 777.

5. Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006; Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597; Gay v. Thorpe, 1 Cal. App. 312, 82 Pac. 221.

as witnesses consent to answer proper questions, the referee or notary may act as efficiently as the judge himself in reducing the evidence to a form in which it may be used at the trial. But the power to punish for contempt in refusing to answer, or of committing to prison until a witness consents to answer, is a judicial function which cannot be delegated."[6]

The statute authorizing depositions to be taken before any officer authorized to administer oaths, in effect constitutes such officers ex-officio officers of the court for the purpose of taking such depositions as they may be called upon to take. Thus it has been said that

"The officer taking the deposition, although he derives his authority primarily from the law, and not from the court, does not act independently of the court. He cannot proceed of his own motion, or upon the mere request of any person, to take a deposition, regardless of the court or of any action pending. He can act only in pursuance of an affidavit made and notice given in an action pending in a court, a notice given by a party to the suit or his attorney, which affidavit and notice confessedly are proceedings in the action."[7]

§ 5. Who may Take Depositions Within State.—Depositions within this state may be taken "before a judge or officer authorized to administer oaths."[8] Numerous provisions are scattered throughout the codes and statutes authorizing various officials to administer oaths, for a summary of which the reader is referred elsewhere.[9] Among others so authorized are every court, every judge, or clerk of any court, every justice, every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence.[10] Authority to take depositions is also specially conferred by the following sections of the Code of Civil Procedure: "Each of

6. Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006. See infra, §§ 5, 6.
7. Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.
8. Code Civ. Proc., § 2031.
9. See AFFIDAVITS, vol. 1, p. 659; OATH AND AFFIRMATION.
10. Code Civ. Proc., § 2093.

the justices of the supreme court, and judges of the superior courts, shall have power in any part of the state, and every justice of the peace within his city and county, or county, and a judge of a police or other inferior court within his city and county, city or town, to take and certify: . . . 3. An affidavit or deposition to be used in this state."[11] "Every court commissioner shall have power: . . . 3. . . . to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever."[12] "It is the duty of notaries public . . . to take depositions."[13]

Military courts of the state are given power to take by commission the testimony of witnesses who cannot reasonably be produced at the trial, to the same extent as superior courts.[14] And each member of the state board of control is authorized to take depositions to be used before the board.[15] Certain early cases relative to the powers of notaries public in the matter of taking depositions must now, in view of the radical change in statutory provisions and practice which have since taken place, be regarded as obsolete.[16]

§ 6. Who may Take Depositions Outside of State.—A commission to take depositions, outside California, but in any place within the United States, may issue to anyone agreed on by the parties, or if they do not agree, to any notary public, judge or justice of the peace or commissioner selected by the court or judge or justice issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-

11. Code Civ. Proc., § 179.
12. Code Civ. Proc., § 259.
13. Pol. Code, § 794.
14. Pol. Code, § 2023.
15. Pol. Code, § 659.
16. McCann v. Beach, 2 Cal. 32, and McCann v. Beach, 2 Cal. 25, holding that, under then existing statutes, notaries could only take depositions to be used outside the county where taken, the right to take depositions to be used within the same county being confined to court commissioners.

consul or consular agent of the United States, or to a judge of a court of record in such country, or to any person agreed upon by the parties.[17] By the Political Code, the governor is authorized to appoint, in each state of the United States, or in any foreign state, one or more commissioners of deeds; and all depositions taken by such commissioners are given the same effect as if taken by a duly authorized officer within the state.[18] Under section 2024 of the Code of Civil Procedure, however, it is not necessary that the commissioner selected by the court, if not a judge, justice or notary, should be a commissioner of deeds appointed by the governor under section 811 of the Political Code. The provision of the Practice Act to this effect[19] was amended when incorporated in the code, so that now a court may select a mere private individual to act as commissioner.[20]

§ 7. In What Proceedings.—The Code of Civil Procedure confers the right to take depositions of a witness out of the state. "1. In an action at any time after the service of summons, or the appearance of the defendant. 2. In a special proceeding, any time after a question of fact has arisen therein. 3. Where default has been made by any or all of the defendants."[1] And it confers the right to take the depositions of witnesses in the state "in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein"[2] in certain cases.[3] Special code and statutory enactments also give the right to take depositions upon the probating

17. Code Civ. Proc., § 2024, as amended May 5, 1917 (Stats. 1917, p. 280; Henry v. Caswell, 23 Cal. App. 14, 136 Pac. 726 (commission may issue to person agreed on). See King v. Green, 7 Cal. App. 473, 94 Pac. 777, decided prior to the amendment of 1909 authorizing notaries public to act.

18. Pol. Code, §§ 811, 813.

19. Stats. 1851, c. 5, § 433.

20. Alcorn v. Gieseke, 158 Cal. 396, 111 Pac. 98.

1. Code Civ. Proc., § 2020.

2. Code Civ. Proc., § 2021.

3. See infra, § 9.

of wills,[4] in proceedings to establish heirship,[5] on election contest of seats in the state legislature,[6] in disbarment proceedings,[7] and in proceedings before the railroad commission.[8] It has also been held that depositions could be taken in insolvency proceedings.[9]

§ 8. Condition of Cause.—Under the explicit terms of sections 2020 and 2021 of the Code of Civil Procedure, the testimony of witnesses in an action, as distinguished from a special proceeding, may be taken by deposition at any time after the filing of the complaint and service of summons, or the appearance of the defendant, and it is not necessary that a formal issue of fact should have been joined in the pleadings.[10] As soon as the summons has been served, or the defendant has appeared, either party may commence the taking of depositions relevant to any possible issue that may arise. Clearly, the existence of

4. Code Civ. Proc., § 1308, providing that if it appears that none of the subscribing witnesses reside in the county, but that the deposition of one of them can be taken elsewhere, the court may direct it to be taken, and may authorize a photographic copy of the will to be made for the purpose.

5. Code Civ. Proc., § 1664.

6. Pol. Code, §§ 275–281, in which elaborate provisions are made for the issuance of a commission by the county clerk of the county where the contest originates, to two justices of the peace, who may compel the attendance of witnesses and punish contempts, and also for the return of the depositions to the legislature. By section 282 depositions may also be taken as provided by the Code of Civil Procedure.

7. Code Civ. Proc., § 298. As to disbarment proceedings generally, see ATTORNEYS AT LAW, vol. 3, p. 719 et seq.

8. The Railroad Commission, or any commissioner, or any party may, in any investigation or hearing before the commission, cause depositions of witnesses residing within or without the state to be taken as prescribed by law in civil actions in superior courts, and to that end may compel the attendance of witnesses and the production of books and documents. Gen. Laws, Act 2886, § 55e.

9. Wagner v. Superior Court, 4 Cal. Unrep. 310, 34 Pac. 648.

10. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 359; California Farm etc. Co. v. Schiaffa Pietra, 151 Cal. 732, 91 Pac. 593; Rossbach v. Superior Court, 43 Cal. App. 729, 185 Pac. 879; Kibele v. Superior Court, 17 Cal. App. 720, 121 Pac. 412.

an actual, as distinguished from a potential, issue of fact, is not, by the terms of the statute, made a conclusive test of the right to take depositions de bene esse.[11] It is therefore immaterial that the case is pending on demurrer to the complaint, no answer having as yet been filed,[12] or that a general demurrer to the complaint has been sustained, and the right granted to file an amended complaint has not yet been exercised.[13] In such case the complaint will be deemed to be amended, and the party may be examined as to all material allegations therein, as section 2065 of the Code of Civil Procedure, providing that a witness must answer questions legal and pertinent to the "matter in issue," will not be limited to formal issues made by the pleadings. On the contrary, the phrase "matter in issue" will be construed as synonymous with the subject matter of the litigation as set forth in the complaint.[14] The filing of amended pleadings, after the taking of depositions, does not warrant their exclusion from evidence, where the issues to which they relate are not materially changed by the amendments.[15]

Pendency of action on appeal.—Under section 2021 of the Code of Civil Procedure, authorizing the taking of depositions in an action "at any time" after the service of the summons or the appearance of the defendant, depositions may be taken after judgment and order denying a new trial, and while the case is pending on appeal, the depositions being taken in anticipation of a possible reversal and retrial of the case. The materiality of the deposition in such case is not to be determined by the issues then

11. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 359.

12. California etc. Co. v. Schiaffa-Pietra, 151 Cal. 732, 91 Pac. 593; Rossbach v. Superior Court, 43 Cal. App. 729, 185 Pac. 879; Kibele v. Superior Court, 17 Cal. App. 720, 121 Pac. 412.

13. Rossbach v. Superior Court, 42 Cal. App. 729, 185 Pac. 879.

14. Kibele v. Superior Court, 17 Cal. App. 720, 121 Pac. 412.

15. Pico v. Cuyas, 47 Cal. 174 (the amended pleading in this case was an answer).

made by the pleadings, but by such amendments to the pleadings as the court on a retrial might be warranted in allowing.[16]

§ 9. Grounds for—Depositions of Prisoners.—Under section 2020 of the Code of Civil Procedure the mere absence of a witness from the state is sufficient to warrant the taking of his deposition, the cause being in an appropriate condition for such procedure.[17] Whether or not he is a resident of another state is immaterial.[18]

Where witness is in state.—The testimony of a witness in the state may be taken by deposition, the condition of the cause so warranting, under the following circumstances, as specified in the Code of Civil Procedure: "1. Where the witness is a party to the action or proceeding,[19] or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended; 2. When the witness resides out of the county in which his testimony is to be used, or resides in the county but more than fifty miles distant from the place of trial or hearing by the nearest usual traveled route; 3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required; 4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend; 5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required; 6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall

16. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 359. See APPEAL AND ERROR, vol. 2, pp. 418, 419, note 17, as to effect of appeal upon power of court over collateral matters.

17. Code Civ. Proc., § 2020.

18. Estate of Dolbeer, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695.

19. Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10.

not be used if his presence can be procured at the time of the trial of the cause."[20] If the witness is a party, his deposition may be taken regardless of his place of residence, and even when he is reachable by subpoena.[1] In the case of other witnesses residing outside of the county of the venue, their depositions may be taken,[2] even when the witness resides within fifty miles of the place of trial.[3]

Depositions of prisoners.—If a material witness be a prisoner in the state but in a county other than that in which a proceeding is pending, his deposition may be taken, on motion of a party upon affidavit and upon an order therefor made, (1) by the court itself in which the action or special proceeding is pending, unless it be a justice's court, or (2) by a justice of the supreme court or a judge of the superior court of the county where the proceeding is pending, if it is pending before a justice's court, or before a judge or other person out of court.[4]

III. Proceedings to Obtain.

Where Witness is Outside State.

§ 10. In General—Notice.—The deposition of a witness out the state must be taken upon a commission issued from the court in which the action is pending, upon an order of the court, or of a judge or justice thereof, on the application of either party to the action, upon five days' previous notice to the other.[5] When, however, service of summons has been by publication and the default of the defendant has been duly entered, and it is made to appear by affidavit that the residence of a party to the action is

20. Code Civ. Proc., § 2021.

1. Skidmore v. Taylor, 29 Cal. 619.

2. Naylor v. Adams, 15 Cal. App. 353, 114 Pac. 997.

3. Skidmore v. Taylor, 29 Cal. 619.

4. Code Civ. Proc., §§ 1995, 1996, 1997.

5. Code Civ. Proc., § 1024. For note as to power to issue or honor letters rogatory, see 9 A. L. R. 966.

unknown and the witness resides out of the state, this notice is dispensed with.[6] Likewise, in all actions and proceedings where the default of the defendant has been duly entered, and in all proceedings to obtain letters of administration, or for the probate of wills and the issuance of letters testamentary thereon, where, after due and legal notice, those entitled to contest the application have failed to appear, the entry of said defaults, and the failure of said persons to appear after notice, is deemed a waiver of the right to any further notice.[7] And the court may authorize the taking of a deposition without the giving of any notice to the party so in default or not appearing, or may provide that notice be given to him in such mode as to the court may seem proper.[8] As in other cases, the court is authorized to prescribe a shorter notice,[9] and the service of a copy of an order to show cause within five days why a commission should not issue to take depositions in another state, followed by the issuance of the commission, has been said to be equivalent to an order shortening time.[10]

Discretion of court.—It does not lie in the discretion of the court or judge to refuse a commission to take depositions in the case defined by the code.[11] Nor can a court punish a defendant for a contempt by denying him a commission to enable him to take a deposition;[12] yet it has been held proper to refuse to order a commission to take the deposition of a plaintiff, where to grant the order would work an unreasonable delay in the trial of the case, and where there is no showing of diligence in attempting to secure plaintiff's deposition, or of the necessity or mate-

6. Code Civ. Proc., § 2029.
7. Code Civ. Proc., § 2004.
8. Code Civ. Proc., § 2023.
9. Code Civ. Proc., § 1005, based on Prac. Act, § 517.
10. Dambmann v. White, 48 Cal. 439.
11. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 359.
12. See CONTEMPT, vol. 5, p. 934, and DIVORCE AND SEPARATION.

riality of the evidence of plaintiff to defendant's case, or of plaintiff's whereabouts.[13]

§ 11. The Commission.—"The commission must authorize the commissioner to administer an oath to the witness and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope, directed to the clerk, if there be one, and if not, to the judge thereof, and forwarded to him by mail or other usual channel of conveyance."[14] It should be directed to a proper person,[15] although it need not state on its face that the person to whom it is addressed is one of the persons named in the statute, the presumption being that the court issuing the commission would not address it to an improper person. Besides, it is sufficient if the return shows that the commissioner was a proper person.[16] When the parties stipulate that depositions in another state may be taken before a named person, "a notary public in and for" a certain city and county, the court may treat the quoted words as descriptive merely, and direct the commission to a person named as a special commissioner.[17] The true name of the witness sought to be examined under the commission should be given to the adverse party and inserted in the commission, so that the adverse party may intelligently prepare his cross-interrogatories. And a commissioner has no authority to take the testimony of anyone other than the witness named, even though he be the person intended.[18]

13. Cobe v. Crane, 173 Cal. 116, 159 Pac. 587. See CONTINUANCES, vol. 5, pp. 990, 1001.

14. Code Civ. Proc., § 2026.

15. King v. Green, 7 Cal. App. 473, 94 Pac. 777. See supra, §§ 5, 6.

16. Dambmann v. White, 48 Cal. 439.

17. Dougherty v. Union Traction Co., 23 Cal. App. 17, 136 Pac. 722.

18. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206, holding that the taking of the testimony of James H. Thompson under a commission to take the deposition of Jno. Thompson, is unauthorized, even though the

Seal and certificate.—The commission must be issued under the seal of the court, and if the court issuing it be a justice's court, the commission must have attached to it a certificate of the clerk of the superior court of the county in which the justice's court is held, under the seal of such superior court, to the effect that the person issuing the commission was an acting justice of the peace at the date the commission bears.[19] But the omission of the seal of the court from a commission may be corrected by amendment allowed by the court after the deposition has been returned.[20]

§ 12. Interrogatories, Written and Oral.—The deposition of a witness outside the state may be taken upon written or oral interrogatories. If the interrogatories are written, they, with the cross-interrogatories, must be settled in accordance with a definite code provision.[1] If the interrogatories are to be propounded orally, another provision is applicable.[2]

The code provisions in regard to notices should doubtless be read in connection with section 2029 of the Code of Civil Procedure dispensing with notices where service has been had by publication, default entered, and an affidavit filed showing that the defendant's residence is unknown and that the witness to be examined resides out of the state.

Where Witness is Within State.

§ 13. In General.—Under section 2031 of the Code of Civil Procedure, either party may have the deposition

party taking the deposition intended that the testimony of James H. should be taken.

19. Code Civ. Proc., § 2024.

20. Marvin v. Eng-Skell Co., 33 Cal. App. 42, 164 Pac. 332.

1. Code Civ. Proc., § 2025.

2. Code Civ. Proc., § 2025½. This section also authorizes the recovery of traveling expenses to the party when he goes to the place designated, and the deposition is not taken, unless the failure be on account of the nonattendance of the witness, not occasioned by the fault of the party giving the notice, or some other unavoidable cause.

taken of a witness in this state, in either of the cases mentioned in section 2021, "on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribes a shorter time. Where a shorter time is prescribed, a copy of the order must be served with the notice."[3] The notice is waived or dispensed with in cases of defendant's nonappearance or default, in which case the court may authorize the deposition without the service of any affidavit or notice or upon such notice as to it seems proper.[4] So also by stipulating that a deposition of a named witness may be taken before a certain officer, one waives service of the required notice and affidavit.[5]

If the party to be served has an attorney, service of notice should be made upon the attorney.[6] Proof of the service may be by parol testimony as well as by affidavit.[7]

Continuance to take deposition.—Where due diligence is shown, a party has the right to a continuance in order to procure the deposition of an absent witness who alone can establish a material fact in the case.[8]

3. Code Civ. Proc., § 2031, based upon Practice Act, § 429, as amended in 1859. See Attwood v. Fricot, 17 Cal. 37, 76 Am. Dec. 567; Ellis v. Jaszynsky, 5 Cal. 444, decided under section 429 of the Practice Act prior to the amendment of 1859.

4. Code Civ. Proc., §§ 2004, 2023. Notice of the taking of depositions in proceedings to determine heirship under section 1664 of the Code of Civil Procedure is to be served, by express provision of the statute, only upon the parties, or the attorneys of the parties, who have appeared in the proceedings.

5. Consolidated Lumber Co. v. Fidelity etc. Co., 161 Cal. 397, 119 Pac. 506.

6. See Griffith v. Gruner, 47 Cal. 644, holding that, under the Practice Act, service upon the party personally was insufficient, if he appeared by counsel. See NOTICE.

7. Hobbs v. Duff, 43 Cal. 485.

8. Dunlap v. Plummer, 1 Cal. App. 426, 82 Pac. 445. See CONTINUANCE, vol. 5, pp. 990, 1002.

§ 14. Requisites of Notice.—When the deposition of a witness within the state is to be taken, the notice required must state both the time and place of examination.[9] While it may be difficult to formulate a general rule as to the particularity with which the place of taking depositions must be specified, yet where the examination is to be taken in cities having a population of fifty thousand or more, in which the streets are named and numbered, it would seem that the office or place of business of the officer before whom they are to be taken should be designated by reference to the street and number, or by such other designation as will make the place easy of ascertainment.[10] It seems, however, that a written notice to take depositions, defective in failing to state the time and place of the taking, may be supplemented by parol proof that the party on whom it was served had actual notice of both circumstances.[11] A defect in the title of the cause does not invalidate a notice to take depositions, especially where the party served is not misled.[12] Under a statute which does not require that the notice should specify the officer before whom the deposition is to be taken, the fact that a deposition was in fact taken before an officer other than the one named in the notice, does not require the exclusion of the deposition from evidence. Notice of the time and place having been given, it is a matter of small importance who shall take the deposition, and public convenience would seem to demand that in case of the sickness or absence of the officer designated, any other empowered by law might be substituted.[13] The statutory provisions relating to orders prescribing less than five days' notice contemplate that the order should prescribe a definite time. And an order that notice be given "forthwith" is not such an order.[14]

9. Lucas v. Richardson, 68 Cal. 618, 16 Pac. 183.
10. Lucas v. Richardson, 68 Cal. 618, 16 Pac. 183.
11. Mills v. Dunlap, 3 Cal. 94.
12. Mills v. Dunlap, 3 Cal. 94.
13. Williams v. Chadbourne, 6 Cal. 559.
14. Howell v. Howell, 66 Cal. 390, 5 Pac. 681.

Designation of witness.—The notice should, it seems, designate the witness whose deposition is to be taken. At all events, when one person is named, the deposition of another cannot be taken,[15] though it has been held that a notice to take the deposition of "Dick" M. is made sufficient to cover the deposition of "J. D." M. by the witness' testimony that he was as well known by one designation as the other.[16] Where the notice and the certificate of the notary to the deposition are not in the record, it will be presumed on appeal, in support of the judgment, that they accurately specified by name the witness whose deposition was in fact taken. This presumption is not rebutted by an indorsement on the envelope containing the deposition, made by the notary taking it, as such indorsement is unofficial and cannot be looked to.[17]

§ 15. Taking Depositions in California for Use Elsewhere.—The Code of Civil Procedure provides for taking depositions in California to be used in litigation in other states,[18] both upon commission[19] and when a commission is not issued.[20] Provision is also made for the issuance of subpoenas in such cases.[1]

Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state requires.[2]

IV. ATTENDANCE AND EXAMINATION OF WITNESS.

§ 16. Securing Attendance.—The attendance of a witness for examination may be compelled by subpoena.

15. Wise v. Collins, 121 Cal. 147, 53 Pac. 640.
16. Jones v. Love, 9 Cal. 68.
17. Wise v. Collins, 121 Cal. 147, 53 Pac. 640.
18. Code Civ. Proc., § 2035.
19. Code Civ. Proc., § 2036.
20. Code Civ. Proc., § 2037.
1. Code Civ. Proc., § 1986.
2. Code Civ. Proc., § 2038.

"To require attendance before a court . . . or upon the taking of a deposition in an action or proceeding pending therein, it [the subpoena] is issued by the clerk of the court in which the action or proceeding is pending, under the seal of the court, or if there is no clerk or seal then by a judge or justice of such court. . . . To require attendance out of court, in cases not provided for in subdivision one, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice, or other officer before whom the attendance is required. . . . If it is issued to require attendance before a commissioner or other officer upon the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required upon the order of such court or of a judge thereof, which order may be made ex parte."[3]

The last sentence in the above quotation was added to the code in 1907, for the purpose, says the code commissioner, of changing the rule as to the issuance of subpoenas "so as to provide that a subpoena to give testimony by deposition must in all cases be issued by the court in which the deposition is to be used." There is a conflict between this provision and the earlier one authorizing the issuance of the subpoena by the officer before whom the attendance is required, but under the settled rule of statutory construction embodied in section 4484 of the Political Code, it would seem that the latter prevails.[4] As appears

3. Code Civ. Proc., § 1986. See supra, § 15, as to issuance of subpoena to compel attendance in California to give deposition to be used elsewhere.

4. Scott v. Shields, 8 Cal. App. 12, 96 Pac. 385. (The decision in this case is placed upon two grounds. One is that stated in the text; the other is that the witness by his conduct had waived the objection. See the following cases decided before the amendment. Barnes v. Superior Court, 140 Cal. 1, 73 Pac. 597 (holding the subpoena issued by the officer before whom a deposition is to be taken is a process of the court in which the action is pending); Pfister v. Superior Court, 64 Cal. 400, 1 Pac. 492, holding that a court has no authority to quash a subpoena issued by a notary public pursuant to affidavit and notice, whether the affidavit be insufficient or not.

In Idaho, the officer taking a deposition has power to summon and compel the attendance of wit-

from this provision the subpoena to require attendance before a commissioner or other officer is issued upon an order of the "court of the county wherein the attendance is required," which need not necessarily be the court in which the action is pending. A subpoena of such court has the same territorial force and effect as a subpoena issued to compel the attendance of a witness before the court in which a trial is pending, and hence it may require the attendance of a witness residing outside the county in which it is issued, but within fifty miles from the place where the deposition is noticed to be taken.[5]

The fact that a subpoena to take the deposition of a party fails to state the place at which he is to appear is immaterial if the place is specified in the notice to take the deposition,[6] and any objection that a subpoena was issued by an improper person is waived by appearing and entering upon the examination without objection.[7]

§ 17. Examination in General.—In the case of depositions taken within this state, "Either party may attend the examination and put such questions, direct and cross, as may be proper."[8] But whether taken within or without the state

"Depositions must be taken in the form of question and answer. The words of the witness must be written down, in the presence of the witness, by the officer taking the deposition, or by some disinterested person appointed by him. It may be taken down in shorthand, in which case it must be transcribed into longhand by the person who took it down. When completed, it must be carefully read to or by the witness and corrected by him in any particular, if desired, by writing or causing his corrections to be

nesses. Ex parte Niday, 15 Idaho, 559, 98 Pac. 845.

5. Merrill v. Superior Court, 33 Cal. App. 55, 164 Pac. 340. In this case, the action was pending in San Bernardino county and the superior court of San Francisco required a witness, a resident of Alameda County, to appear in San Francisco to give his deposition.

6. Keisker v. Ayres, 46 Cal. 83.

7. Scott v. Shields, 8 Cal. App. 12, 96 Pac. 385.

8. Code Civ. Proc., § 2032.

written in the body or margin of or at the bottom of the deposition, and must then be subscribed by the witness. The officer before whom the deposition is taken must write his initials near said corrections. If the parties agree in writing to any other mode, the mode so agreed upon must be followed."[9]

It seems that a court may direct an officer before whom depositions are being taken to exclude other persons while a witness is testifying before him, this being an extension of the rule set forth in section 2043 of the Code of Civil Procedure providing for such exclusion by the court. Such a direction, if proper, is within the discretion of the court, and its action in refusing it will not be disturbed upon appeal in the absence of an abuse of discretion.[10]

Postponement.—Where depositions are not taken on the day specified in the notice, and the adverse party has no notice of a continuance of the time for taking them, they may properly be excluded from evidence.[11]

§ 18. Answers and Objections.—Under sections 2064 and 2065 of the Code of Civil Procedure so providing, a witness whose deposition is being taken must answer all legal and pertinent questions propounded to him, and must produce documents under his control which are lawfully required under the subpoena. If a witness has any reason for refusing to answer a question he should state it, so as to enable the party to avoid the objection if possible.[12] It is not the province of the officer taking a deposition to pass upon objections to the admissibility of testimony. It is only required that the objection be stated.[13] And it

9. Code Civ. Proc., § 2006. See Code Civ. Proc., § 2032 (specifically providing that a deposition taken within the state, "when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness. . . .")

10. Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430.

11. Bauer v. State, 144 Cal. 740, 78 Pac. 280.

12. Proctor v. Sturtevant, 32 Cal. App. Dec. 782.

13. Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

has been said that this is true whether the officer be a notary, or a judge of the court in which the action is pending, the party objecting being entitled to a ruling of the court as such.[14]

§ 19. Transcription, Signature and Exhibits.—The provision in section 2006 of the Code of Civil Procedure authorizing depositions to be taken down in shorthand was adopted after a decision of the supreme court holding such practice lawful,[15] and it applies equally to depositions taken in this state and elsewhere.[16] Despite the provisions of the statute, a deposition may be taken in narrative form, instead of by question and answer, especially when only the party taking the examination appears.[17] But it is material and necessary that the deposition, when transcribed, shall be read to the witness, and, if desired, corrected by him, and then subscribed by him, for the reason that when a witness signs a deposition, he adopts its language as his own and is thereby made responsible for its phraseology.[18] While section 2032 of the Code of Civil Procedure so providing is applicable only to depositions taken in the state,[19] the same requirement added to section 2006 of the same code, by an amendment in 1907, is applicable to depositions taken elsewhere. Exhibits referred to in a deposition need not be attached to it,[20] but they cannot be used in evidence without proper proof of their identity.[1]

§ 20. Enforcing Obedience by Witness.—Prior to 1907 the disobedience of a witness whose deposition is desired

14. Dissenting opinion of Angellotti, J., in Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006.

15. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

16. Alcorn v. Gieseke, 158 Cal. 396, 111 Pac. 98.

17. Prolus v. Pacific G. & S. M. Co., 35 Cal. 30.

18. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

19. St. Vincent's Inst. etc. v Davis, 129 Cal. 20, 61 Pac. 477.

20. Bradford v. Woodworth, 108 Cal. 684, 41 Pac. 797; Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 33 Pac. 550.

1. Bradford v. Woodworth, 108 Cal. 684, 41 Pac. 797.

was declared by the code to be punishable by the court or officer issuing the subpoena. But it was held that the attempt to confer on a ministerial officer the power to punish for contempt—a power essentially judicial in its nature—was unconstitutional,[2] and that the power existed in the court alone.[3] So that in that year section 1991 of the Code of Civil Procedure was amended so as to provide for punishment by the court issuing the subpoena.[4]

While the disobedience of a witness may be punished summarily, as in the case of other direct contempts, where a deposition is taken before the judge before whom an action is pending and the disobedience takes place in his presence,[5] as indicated by section 1991, in case of depositions taken before an officer out of court, disobedience of a witness cannot be punished until after it has been reported to the court and an order requiring the doing of the omitted act has been made. This is true whether the witness has disobeyed the subpoena, as when he refuses to answer a question or to subscribe his deposition.[6] The fact that similar proceedings have been instituted before the court having jurisdiction of the action in which the deposition is to be used, does not deprive the court of the county where the deposition is taken of jurisdiction in the matter.[7]

§ 21. Compelling Court Action by Mandamus.—When a judge before whom a deposition is being taken refuses to compel a witness to answer proper questions, he may be

2. Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006; Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

3. Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006; Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597 (overruling, to this extent, Lazinsky v. Superior Court, 72 Cal. 510, 14 Pac. 104, though with three justices dissenting); Gay v. Thorpe, 1 Cal. App. 312, 82 Pac. 221.

4. Code Civ. Proc., § 1991. See CONTEMPT, vol. 5, pp. 892, 908; WITNESSES.

5. Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006 (two justices dissenting). See CONTEMPT, vol. 5, p. 941.

6. Merrill v. Superior Court, 33 Cal. App. 55, 164 Pac. 340.

7. Lamphrey v. Superior Court, 8 Cal. App. 80, 96 Pac. 389.

compelled to do so by mandamus.[8] So also, under section 1991 of the Code of Civil Procedure, when an officer taking a deposition reports the disobedience of a witness, it is the duty of the court to determine whether the witness should be required to obey, and if so, to order him to do the omitted act and to punish him for contempt if he persist in his disobedience.[9] And the court may be compelled to perform its duty in these respects by mandamus.[10] It is no objection to proceedings by mandamus that the action of the court might be reviewed on appeal, such remedy being inadequate. Yet where the proceedings for the taking of the depositions have been continued, and the party secures answers by reframing his questions, a writ of mandamus will be denied.[11] However, the fact that the witness will become a resident of the county of trial before the trial of the action will not preclude the issuance of the writ against a judge in another county where the deposition is to be taken, although that fact might possibly be considered in the contempt proceeding.[12]

V. CERTIFICATE AND RETURN.

§ 22. Certificate.—Depositions taken in California must be "certified by the judge or officer taking the deposition."[13] Where the deposition is taken out of the state

8. Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006. See MANDAMUS.

9. Proctor v. Sturtevant, 32 Cal. App. Dec. 782; Lamphrey v. Superior Court, 8 Cal. App. 80, 96 Pac. 389; Scott v. Shields, 8 Cal. App. 12, 96 Pac. 385.

10. Proctor v. Sturtevant, 32 Cal. App. Dec. 782; Wissman v. Cabaniss, 34 Cal. App. 487, 168 Pac. 150 (granting writ where the court erroneously held that the matter in suit had been determined in previous litigation and on that account refused to act); Lamphrey v. Superior Court, 8 Cal. App. 80, 96 Pac. 389; Scott v. Shields, 8 Cal. App. 12, 96 Pac. 385.

11. Proctor v. Sturtevant, 32 Cal. App. Dec. 782.

12. Scott v. Shields, 8 Cal. App 12, 96 Pac. 385. See MANDAMUS.

13. Code Civ. Proc., § 2032.

the commission must authorize the commissioner "to certify the deposition to the court."[14] While the precise form of the certificate to be appended to a deposition by the officer taking it is nowhere prescribed by law, a certificate showing substantial compliance with the statutory provisions as to the mode of taking and certifying depositions is required,[15] and is sufficient.[16] Among other things, the certificate should show that the deposition was read to the witness before he signed it,[17] and that the deposition, if taken within the state, was taken on the day named in the notice.[18] If a deposition is taken on written interrogatories attached to a stipulation which makes no mention of any date therefor, the date of the examination of the witness is immaterial and need not be shown by the commissioner's certificate. In any event, if it should be important that the date appear, it is sufficiently shown by the jurat.[19] Where the depositions of two or more witnesses are taken in behalf of the same party, under the same notice, at the same time and place, and before the same officer, one certificate, appended at the close of all the depositions, if in proper form, may cover all of them.[20]

Reading deposition to witness.—A certificate to a deposition must show that the deposition was read to the witness before he signed it, whether it was taken within or without the state.[1] But a certificate is sufficient in this respect, which recites that the deposition, when completed, "was by me [the officer] carefully read to said witness, and being by him corrected," was subscribed by him,[2] or which

14. Code Civ. Proc., § 2026.

15. Williams v. Chadbourne, 6 Cal. 559; Dye v. Bailey, 2 Cal. 383.

16. Short v. Frink, 151 Cal. 83, 90 Pac. 200; Mills v. Dunlap, 3 Cal. 94.

17. See infra, this section.

18. Dye v. Bailey, 2 Cal. 383.

19. Elgin v. Hill, 27 Cal. 372.

20. Pralus v. Pacific G. & S. M. Co., 35 Cal. 30; Williams v. Chadbourne, 6 Cal. 559.

1. See supra, § 19.

2. Short v. Frink, 151 Cal. 83, 90 Pac. 200.

states it was corrected by the officer under the direction of the witness.[3]

Signature and seal.—The certificate attached to a deposition must be signed by the judge or officer taking it, or the deposition cannot be admitted in evidence.[4] But the fact that a commissioner appointed to take depositions in another state, signed the certificate as notary public, as well as commissioner, is immaterial, his signature as commissioner being alone legally sufficient.[5] The certificate of a notary must also be sealed with his official seal, his private seal being insufficient.[6] But where one, who is in fact a notary in another state, is appointed as a special commissioner agreed on by the parties to take depositions there, it is not necessary that his certificate to the depositions should bear his notarial seal, his signature as special commissioner being a sufficient authentication.[7]

§ 23. Return.—After a deposition taken in this state is subscribed by the witness and certified by the officer, it "must then be . . . inclosed in an envelope or wrapper, sealed, and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer [taking it] to the clerk or such person, or transmitted through the mail or by some safe private opportunity. . . ."[8] The officer is not authorized to make any indorsement on the envelope inclosing the deposition, and any such indorsement is extraofficial, and can neither add to nor detract from the validity or authenticity of a deposition.[9] Depositions taken out of the state are to be placed in a sealed envelope by the commissioner, and directed to

3. Higgins v. Wortell, 18 Cal. 330.
4. Beckman v. Waters, 161 Cal. 581, 119 Pac. 922.
5. Alcorn v. Gieseke, 158 Cal. 396, 111 Pac. 98.
6. Dye v. Bailey, 2 Cal. 383. See Pol. Code, § 794, subd. 8.
7. Dougherty v. Union Traction Co., 23 Cal. App. 17, 136 Pac. 722.
8. Code Civ. Proc., § 2032.
9. Wise v. Collins, 121 Cal. 147, 53 Pac. 640.

the clerk of the court where the action is pending, if there be one, and if not, to the judge, and are to be forwarded by mail or other usual channel of conveyance. The commission itself must authorize the commissioner to make this return.[10] There is nothing in the law requiring the immediate transmission of depositions to the clerk of the court, after being taken.[11] If depositions have not been transmitted before trial, either party, if he wishes to use them, may move for a continuance till they come to hand.[12] It is provided, however, that "A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence, satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it."[13]

VI. USE IN EVIDENCE.

§ 24. Use Generally.—In California the only authority for the use of depositions is in the provisions of the Code of Civil Procedure.[14] That code requires that in all cases where the use of affidavits is not expressly sanctioned, any written declaration under oath that may be used must be a deposition.[15] It is provided generally that a deposition taken and returned as provided in the code may be read in evidence "by either party at any stage of the action or proceeding in which it was taken or in any other action or proceeding between the same parties or their privies or successors in interest upon the same subject, and is then deemed the evidence of the party reading it; but the court may exclude the same if it appears that the taking thereof was in any material respect unfair."[16] With reference to depositions taken in the state it is further provided that

10. Code Civ. Proc., § 2026.
11. Bank of Ukiah v. Mohr, 130 Cal. 268, 62 Pac. 511.
12. Heath v. Scott, 65 Cal. 548, 4 Pac. 557.
13. Code Civ. Proc., § 2027.
14. Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976.
15. Code Civ. Proc., § 2019.
16. Code Civ. Proc., § 2022. See infra, § 30, as to use in other action or proceeding.

they "may be used by either party upon the trial or other proceeding against the party giving or receiving the notice subject to all legal exceptions," save objections to the form of interrogatories not stated at the time of examination by parties in attendance.[17] A deposition taken out of the state "may be used by either party on the trial or other proceeding, against any other party giving or receiving the notice, subject to all just exceptions."[18]

A party taking depositions is not bound to offer them in evidence, but may resort to other evidence, and his action in doing so is not such legal surprise upon the opposite party as will justify a new trial. If the party taking depositions does not offer them, the adverse party may offer them or any part of them.[19]

§ 25. Admissibility—Part of Deposition.—As indicated by the code sections quoted, a deposition is not admissible in evidence unless it is taken and returned substantially in the manner prescribed.[20] This rule will not, however, preclude one from using an informal deposition for purposes of impeachment.[1]

Unfairness.—The court in which a deposition is offered in evidence is given blanket power to exclude it, "if it appears that the taking thereof was in any material respect unfair."[2] Under such a provision, something is left to the discretion of the court,[3] for the mere fact that a deposition has been irregularly taken does not neces-

17. Code Civ. Proc., § 2032. See infra, § 32, as to objections to interrogatories.

18. Code Civ. Proc., § 2028.

19. Heath v. Scott, 65 Cal. 548, 4 Pac. 557 (citing Code Civ. Proc., § 2034, since repealed. But section 2022, here quoted, is a substitute for section 2034). See NEW TRIAL.

20. Beckman v. Waters, 161 Cal. 581, 119 Pac. 922. See infra, § 35.

1. Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441. As to impeachment of witnesses generally, see WITNESSES.

2. Code Civ. Proc., § 2022.

3. Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183 (construing section 2033 of the Code of Civil Procedure for which section 2022 is now substituted).

sarily render it inadmissible in evidence.[4] However, the taking of a deposition is not rendered "unfair," within the meaning of the statute, by the mere fact that the party on whose behalf it was taken saw and glanced over the interrogatories when opened by the notary, or by the fact that he received a copy of the interrogatories.[5]

Admissibility of documents copied or referred to.—Copies of documents, incorporated in a deposition, are as admissible as any other portions of the deposition, even as against objection that the copies are not the best evidence.[6] So also a book identified by a witness in his deposition as being then in court is properly received in evidence, in connection therewith.[7]

Offering portion only of deposition.—It is not permissible for a party to introduce in evidence selected portions of the deposition of his own witness, omitting the rest.[8] This necessarily follows from the provision of the code that "the deposition" may be used, no reference being made to portions of a deposition.[9] This rule does not, however, prevent a court from excluding an immaterial or incomplete portion of a deposition upon objection of the adverse party.[10] And there is authority elsewhere to the effect that one may read the whole or part of a deposition taken on behalf of his adversary, the principle being, apparently, that parts of a deposition may be used as declarations of the party testifying or as a declaration of a witness to contradict him.[11]

4. Schwartz v. Royal Neighbors etc., 12 Cal. App. 595, 108 Pac. 51.

5. Homan v. Wayer, 9 Cal. App. 123, 98 Pac. 80.

6. Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27.

7. Lucy v. Davis, 163 Cal. 611, 126 Pac. 490.

8. Metteer v. Smith, 156 Cal. 572, 105 Pac. 735; Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976; Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

9. Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976.

10. Cole v. Bux, 33 Cal. App. Dec. 442, 194 Pac. 71.

11. Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976, distinguishing cases from other jurisdictions.

As against substituted parties.—While a transferee pendente lite is bound by prior proceedings and a deposition taken after alienation and before he becomes a party may be used against him, as it might have been used against his predecessor in interest, this rule does not apply to a case where the transfer was had before action brought, even though the grantee's deed was not recorded till after action commenced, or the grantee, as attorney for original defendant, attends at the taking of the depositions.[12]

After consolidation of actions.—Where two actions are ordered consolidated, depositions taken in one may be read in the other. And it is no objection, in such a case, that nominal parties in the action in which the depositions were read did not have an opportunity to cross-examine.[13]

§ 26. Preliminary Proof.—If a deposition is taken under subdivisions two, three and four of section 2021 of the Code of Civil Procedure, that is to say, if it is taken on the ground that a witness resides out of the county, or more than fifty miles from the place of trial, or that he is about to leave the county and will probably continue absent when his testimony is required, or that the witness is too infirm to attend, it is required that "proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition then taken may also be read in case of the death of the witness."[14] It is not necessary to prove also that the presence of the witness cannot be procured at the time of the trial of the cause,[15] though proof of that fact is necessary when a deposition of a witness is taken on the ground that he is the only witness who can establish facts or a fact material to the issue.[16] It is unnecessary to prove the absence of the

12. Lange v. Braynard, 104 Cal. 156, 37 Pac. 868.

13. Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143. See ACTIONS, vol. 1, pp. 372, 374.

14. Code Civ. Proc., § 2032; Curran v. Wilson, 36 Cal. App. 208, 171 Pac. 817.

15. Johnston v. McDuffee, 83 Cal. 30, 23 Pac. 214.

16. Code Civ. Proc., § 2021, subd. 6.

witness where the deposition is that of a party, or an officer or member of a corporation which is a party. Such deposition may be read by either party, even though the witness is in court,[17] and even though the facts might be proven by other witnesses present.[18] And the fact that the party has already been examined and cross-examined as a witness does not justify the exclusion of his deposition, even though it is not offered for purposes of impeachment.[19]

Depositions taken without state.—In the case of the deposition of a witness outside the state, no preliminary proof of absence is required, the presumption being that the witness continues absent. Such being the case, the burden is on the party objecting to the use of the deposition to show the contrary. But a mere statement by a person that he had been informed that the witness was in a certain city in the state, but had been unable to subpoena him, is insufficient to justify excluding the deposition.[20]

Waiver of proof.—A party may waive the necessary preliminary proof by a failure to object,[1] or by accepting as true the unsworn statement of counsel offering a deposition.[2]

§ 27. Sufficiency of Preliminary Showing.—No absolute rule may be stated with reference to the sufficiency of the

17. Adams v. Weaver, 117 Cal. 42, 48 Pac. 972; Johnston v. McDuffee, 83 Cal. 30, 23 Pac. 214; Newell v. Desmond, 74 Cal. 46, 15 Pac. 369.

18. Johnston v. McDuffee, 83 Cal. 30, 23 Pac. 214.

19. Adams v. Weaver, 117 Cal. 42, 48 Pac. 972. See, however, Grigsby v. Shwarz, 82 Cal. 278, 22 Pac. 1041, holding that it is entirely discretionary with the trial court to refuse to allow the deposition of a party, who is present in court and has been fully examined as a witness in his own behalf to be read by his counsel, it not appearing that there was anything in the deposition concerning which he could not have testified on the stand.

20. Estate of Dolbeer, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695.

1. Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143. See APPEAL AND ERROR, vol. 2, pp. 263, 268, note 18; TRIAL.

2. Estate of Learned, 70 Cal. 140, 11 Pac. 587.

showing required of the absence of the witness, to justify the introduction of his deposition;[3] the matter being discretionary with the trial court.[4] A deposition taken on the ground of the residence of a witness in another county may be admitted on proof to the satisfaction of the court that the witness still resides in the other county and is absent from the county where the trial is had.[5] And it has been held that a showing that a witness is out of the state is sufficient, if it appears that, in answers to inquiries made at his former place of business, and of others who knew him, it was said they did not know where he was, but understood that he was out of the state.[6] A deposition of a witness taken because he was about to leave the county and would probably continue absent when his testimony was required, may be admitted if he is in fact absent when the deposition is offered in evidence, although he may have been present just before that time.[7] On the other hand, however, the deposition of the only witness able to establish a material fact may be excluded if counsel knew he was present at the place of trial just before his deposition was offered and made no effort to subpoena or detain him.[8]

§ 28. **Weight and Effect.**—While it has been said that testimony given in a deposition is in character parol, and to be given the same weight as oral testimony,[9] the evidence of a party, taken by deposition ex parte, though after notice, and without cross-examination, will be regarded with suspicion, and only a very literal interpreta-

3. Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961.

4. Seelye v. Harvey, 46 Cal. App. 448, 189 Pac. 311; Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961. See APPEAL AND ERROR, vol. 2, pp. 902, 903; EVIDENCE.

5. Sunol v. Molloy, 63 Cal. 369.

6. Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820.

7. Estate of Dolbeer, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695.

8. Jameson v. Tully, 178 Cal. 380, 173 Pac. 577.

9. See 8 Ruling Case Law, 1165. See Code Civ. Proc., § 2089, relating to proceedings to perpetuate testimony.

tion will be given to statements in it favorable to the party's interests.[10] A deposition used on a motion to suppress an earlier deposition, and tending to show the circumstances under which such deposition was taken and that the witness was assisted in giving names and dates, may be considered in determining what weight should be given the earlier deposition, though the motion to suppress was overruled.[11] But a party cannot complain that the deposition of his witness, introduced by the adverse party, is limited in evidentiary effect to a particular purpose by the court, where the limitation is imposed on his own objection, and he could have made the deposition a part of the record for all purposes had he so desired.[12]

§ 29. **Taking to Jury-room.**—Section 612 of the Code of Civil Procedure specifically excludes depositions from the papers which the jury on retiring may take with them to the jury-room.[13] This is done for the very obvious reason that depositions may, and usually do, contain matters not admissible in evidence, and which have been eliminated from the consideration of the jury, and for the reason that to permit the jury to take the depositions with them would be to put them in possession of this excluded evidence.[14] This rule does not apply to a document, not physically attached to a deposition, which is admitted in evidence, after being identified and proven thereby, as such document cannot be said to be a part of the deposition within the meaning of the statute.[15]

10. Spring v. Hill & Carr, 6 Cal. 17.

11. Estate of Friedman, 178 Cal. 27, 172 Pac. 140.

12. Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351. See APPEAL AND ERROR, vol. 2, pp. 846, 848.

13. People v. Balestieri, 23 Cal. App. 708, 139 Pac. 821; Castor v. Bernstein, 2 Cal. App. 703, 84 Pac. 244. As to articles which may be taken to jury-room in general, see TRIAL.

14. Higgins v. Los Angeles Gas & Electric Co., 159 Cal. 651, 34 L. R. A. (N. S.) 717, 115 Pac. 313.

15. Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318.

§ 30. Use in Subsequent Proceedings—*In general.*—The proper preliminary proof being made, a deposition properly taken and returned as provided in the Code of Civil Procedure, may be read in evidence by either party "in any other action or proceeding between the same parties or their privies or successors in interest upon the same subject, and is then deemed the evidence of the party reading it."[16] With reference to the identity of the parties in the action or proceeding in which a deposition is taken and in that in which it is to be used, it is not necessary that there be an exact identity in both actions. For example, where the obligation sued on is joint and several, it is not material that one of the defendants was omitted from the second action.[17] In order to ascertain who are the real parties to an action, the court may always look beyond the record, yet no person, whatever his interest, can be held to be a party unless he has voluntarily undertaken the prosecution or defense in protection of his own interest or in pursuance of some obligation which he has incurred, or held himself out as so doing. One who has not intermeddled in an action except by procuring a dismissal thereof cannot be regarded as a party within the rule.[18]

Successors in interest.—Prior to 1907 there was no mention of "successors in interest" in the statute allowing the use of depositions in subsequent actions or proceedings upon the same subject, yet it was held that the phrase "between the same parties" included successors in interest of the original parties.[19] The statute has since been changed in accordance with this holding.

Effect of stipulation.—The fact that a deposition is taken under a stipulation providing that it may be used "in the trial of said action" does not preclude its being

16. Code Civ. Proc., § 2022.

17. Consolidated Lumber Co. v. Fidelity etc. Co., 161 Cal. 397, 119 Pac. 506.

18. McDonald v. Cutter, 120 Cal. 44, 52 Pac. 120.

19. Briggs v. Briggs, 80 Cal. 253, 22 Pac. 334.

used in another action between the same parties upon the same subject, and this is true even though the notice and affidavit were omitted pursuant to the stipulation.[20]

Under Workmen's Compensation Act.—Section 60, subdivision a, of the Workmen's Compensation, Insurance and Safety Act provides that the industrial accident commission created by the act shall not be bound by the common law or statutory rule of evidence, but may make such inquiry, through oral and documentary evidence as is best calculated to ascertain the substantial rights of the parties.[1] Under this section a deposition taken in an action at law to which an employer and his insurer were not parties, and which to them is hearsay, may nevertheless be introduced in evidence against them in a hearing before the commission.[2]

VII. OBJECTIONS.

§ 31. Time and Waiver.—The time of making objections to depositions depends upon the grounds upon which they are based. If a party has suffered detriment from the insufficiency of a notice, he should promptly move to suppress the deposition, and not postpone his objection until it is offered in evidence at the trial so as to prevent any correction of the mistake.[3] Defects in the form of the notice are waived by the appearance of the party and by his participation in taking the deposition even under objection.[4] But a party who has not appeared at the

20. Consolidated Lumber Co. v. Fidelity etc. Co., 161 Cal. 397, 119 Pac. 506. See EVIDENCE, as to admissibility of transcript of testimony given on former trial.

1. Stats. 1917, p. 831. See MASTER AND SERVANT.

2. Ocean A. & G. Corp. v. Industrial Acc. Com., 180 Cal. 389, 182 Pac. 35.

3. Kelley v. Ning Yung Ben. Assn., 2 Cal. App. 460, 84 Pac. 321. But see Mills v. Dunlap, 3 Cal. 94, holding a motion to suppress a deposition is premature if made befor trial.

4. Bollinger v. Bollinger, 153 Cal. 190, 94 Pac. 770. (The omission of the name of the officer before whom the affidavit was verified in the

taking of a deposition may challenge the sufficiency of the notice by objecting to the reading of the deposition in evidence.[5] An objection to the disqualification of a deponent existing at the time the deposition is taken must be raised at the earliest opportunity.[6] It has been held that objections to the sufficiency of the official certificate attached to a deposition may, in the absence of statute or rule of court, be taken at any time before the deposition is read in evidence, and need not be taken by exception filed before the time of trial.[7]

Objections to depositions may not be made for the first time on a motion for a new trial, whether the movant was present at the trial or not.[8] So also one may not object for the first time upon appeal that no notice of the application for a commission to take it was given,[9] or that no opportunity to cross-examine was given certain parties.[10] So also an objection to a document produced by a witness on the taking of a deposition, and noticed in the deposition, but not urged before or passed on by the trial court, may not be taken advantage of for the first time on appeal.[11] On the other hand, where a deposition previously used is again read on a retrial of the action, the parties are at liberty to interpose new objections to it, the doctrine of the law of the case having no application to new objections.[12]

copy served upon the adverse party is such a defect as is waived by appearing at the taking of the deposition.) Jones v. Love, 9 Cal. 68. (The objection that the notice was too short, is waived by appearing at the taking of the deposition, even though the objection is entered before the cross-examination is begun.) Kelly v. Ning Yung Ben. Assn., 2 Cal. App. 460, 84 Pac. 321.

5. Howell v. Howell, 66 Cal. 390, 5 Pac. 681.

6. See infra, § 34.

7. Dye v. Bailey, 2 Cal. 383.

8. Clark v. Gridley, 35 Cal. 398.

9. Hobbs v. Duff, 43 Cal. 485. See APPEAL AND ERROR, vol. 2, p. 248.

10. Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143.

11. Parrott v. Byers, 40 Cal. 614.

12. Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101. See APPEAL AND ERROR, vol. 2, p. 1042 et seq.

Under rule of court.—A rule of court that "all exceptions to depositions . . . unless appearing on the face thereof," must be filed three days before trial, means that the objection itself, not merely the objectionable matter, must appear on the face of the deposition in order to avoid the filing of exceptions. Under such a rule, an exception that a portion of the deposition is hearsay, must be taken before the trial, since it is not ground for excluding the deposition in its entirety. Where such a rule is not complied with before the first trial of a cause, the fact that a second trial followed the next day and at too short an interval to allow of compliance with the rule, does not avoid the effect of the rule or absolve the objecting party from his original default.[13]

Waiver.—A party may waive objections to deposition by stipulation. Thus where it is stipulated that depositions were duly and properly taken, at the proper times and places, by and before officers authorized to take them, and that they may be read by either party at the trial, the depositions may be admitted in evidence notwithstanding objections to them.[14] So also a party is estopped from objecting that the officer taking a deposition was not competent to act where after the appointment he files cross-interrogatories and enters into stipulation authorizing the appointee to do certain specified things.[15] And a stipulation that the depositions of a witness residing out of the state may be taken before a designated person and may be used on the trial, operates as an estoppel to urge the want of a commission issued by the court.[16]

§ 32. To Interrogatories.—With reference to depositions taken out of the state it is provided that "If the parties do not agree as to the form of the interrogatories,

13. Myers v. Casey, 14 Cal. 542.
14. Robinson v. Placerville & S. V. R. R. Co., 65 Cal. 263, 3 Pac. 878.
15. Crowther v. Rowlandson, 27 Cal. 376.
16. Palmer v. Uncas Mining Co., 70 Cal. 614, 11 Pac. 666.

the court must settle their form, but such agreement or settlement does not preclude either party, when the deposition is offered in evidence, from interposing any objection to any interrogatory except as to the form thereof."[17] As to depositions taken in the state it is provided that they may be used "subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination."[18] Under such a provision as the latter, an objection to a question in a deposition as incompetent and immaterial may be made when the deposition is offered in evidence, the objection not going to the form of the interrogatory.[19] But objections that questions asked the witness are leading must be made when the deposition is taken.[20]

§ 33. To Answers.—Objections to the relevancy or competency of the evidence in a deposition may be made at trial.[1] If, in a deposition, the witness' answer to an interrogatory is not responsive, it may be stricken out.[2] And where it appears from the cross-examination of witnesses whose depositions are offered in evidence, that their answers to some of the interrogatories in chief were based wholly on statements made to them by persons other than the adverse party to the suit, the answers should be stricken out should be granted.[3] In this connection the general rule that if it is not apparent from a question itself that the response thereto will be inadmissible, it is necessary to strike out the answer when its inadmissibility appears[4] applies where a deposition is being read in evi-

17. Code Civ. Proc., § 2025.

18. Code Civ. Proc., § 2032.

19. Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27.

20. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

1. Lawrence v. Fulton, 19 Cal. 683.

2. Golden Gate Mill etc. Co. v. Joshua Hendy Machine Works, 82 Cal. 184, 23 Pac. 45.

3. Amann v. Lowell, 66 Cal. 306, 5 Pac. 363.

4. See APPEAL AND ERROR, vol. 2, p. 265; TRIAL.

dence.[5] In a recent case, however, it was held that when depositions are to be used in evidence before a jury, it is the duty of the trial court to give to them a preliminary inspection to determine the relevancy, responsiveness and propriety of the answers given to interrogatories, so that improper and inadmissible evidence may be ruled out before being read to the jury; and that it is insufficient to merely order such evidence stricken out after it has been read. The rule applicable to documentary evidence in general, in this respect, is applicable to depositions.[6] Where the answer to an interrogatory in a deposition is strictly responsive, it is too late, after the answer has been read, to move to strike out the answer. Objection must be made to the interrogatory.[7]

§ 34. **To Competency of Deponent.**—If a witness is incompetent at the time of taking his deposition, it is the duty of the party to object at the earliest possible moment, that is to say, at the taking of the deposition. By appearing and taking the deposition he waives the objection, notwithstanding the fact that it is expressly provided that the introduction of the deposition is "subject to all legal objections."[8] Thus under the early practice it was held that by taking the deposition of a witness otherwise incompetent because of interest, one waives the objection and the adverse party can introduce the deposition in his own behalf.[9] In like manner the act of an executor in taking the deposition of a plaintiff is a waiver of the incompetency of the latter to testify regarding transactions

5. Short v. Frink, 151 Cal. 83, 20 Pac. 200, holding that a court may assume that a proper question will be followed by an admissible answer; and that it is incumbent on the protesting party to move to have the answer stricken out when it is read.

6. Estate of Martin, 170 Cal. 657, 151 Pac. 138.

7. De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059. See supra, § 32.

8. McClenahan v. Keyes, 63 Cal. Dec. 465, 206 Pac. 454; Brooks v. Crosby, 22 Cal. 42; Jones v. Love, 9 Cal. 68; Turner v. McIlhaney, 8 Cal. 575.

9. Turner v. McIlhaney, 8 Cal. 575.

with the deceased, and the plaintiff may introduce the deposition on his own behalf.[10] A stipulation that depositions might be taken "subject to all objections as to the propriety, relevancy and materiality" of each question, and reserving the right to object at the trial to each interrogatory upon the grounds of "propriety, relevancy, competency and materiality," does not operate as a waiver of an objection as to the competency of the witnesses.[11] But a stipulation that a deposition taken in another case might be used "with the same force and effect, and subject to the same exceptions and objections," as if taken in the case on trial, will be construed as reserving only such objections as could properly be made at the trial.[12] The removal of the disqualifications of a witness after the taking of his deposition and before trial does not render his deposition admissible, since his disqualification taints his testimony when given.[13] So, also, if a witness becomes incompetent by legislation before the trial, his deposition is subject to objection to the same extent as if he were personally present.[14]

§ 35. **Sufficiency—Discretion of Court.**—An entire deposition cannot be excluded because some of the questions asked in the examination were improper,[15] or because a portion of it is hearsay,[16] but such objections must be directed at the particular questions or answers which are improper, or they will be deemed waived. A motion to strike out the entire deposition of a witness on the ground that practically all of the witness' testimony appeared to be based upon hearsay, is too indefinite where some of the witness' statements were from personal knowledge,

10. McClenahan v. Keyes, 63 Cal. Dec. 454, 206 Pac. 454.

11. Fox v. Tay, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

12. Brooks v. Crosby, 22 Cal. 42.

13. Kimball v. Gearhart, 12 Cal. 27.

14. Mitchell v. Haggenmeyer, 51 Cal. 108.

15. Higgins v. Wortell, 18 Cal. 330.

16. Myers v. Casey, 14 Cal. 542. See TRIAL.

and is properly overruled.[17] So also when a witness has refused to answer certain interrogatories put on behalf of the objecting party, it is necessary to point out the specific question which the witness has refused to answer, or to which his answer was evasive or irresponsive.[18] The general rule that objections to evidence must be specific, applies with special force to objections made to a deposition on the ground of irregularity or want of authority in its taking, as a general objection reaches the relevancy, competency or legal effect of the testimony only.[19] And so it has been held that a general objection is insufficient to raise the question as to the failure to direct the commission to a specifically named officer or commissioner.[20]

Discretion of court.—Objections to depositions rests in the sound discretion of the trial court, and it is the duty of the judge to decide whether the grounds of objection are sufficiently established.[1] So also something is left to the discretion of the court, in excluding depositions for insufficiency of the notice.[2] Technical objections to the notice, to the manner of taking a deposition and to the attestation are properly overruled.[3]

VIII. PROCEEDINGS TO PERPETUATE TESTIMONY.

§ 36. In General.—It was an important part of the auxiliary jurisdiction of courts of equity to provide for the perpetuation of testimony in view of anticipated litigation. The proceeding was by bill, and involved the long and tedious procedure of a suit in equity. Relief was cautiously administered, and the chancellor in later

17. Lucy v. Davis, 163 Cal. 611, 126 Pac. 490.

18. Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242.

19. See APPEAL AND ERROR, vol. 2, pp. 273, 274.

20. King v. Green, 7 Cal. App. 473, 94 Pac. 777.

1. Mills v. Dunlap, 3 Cal. 94.

2. Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183.

3. Mills v. Dunlap, 3 Cal. 94.

times hesitated to award a commission in a case for which an exact precedent could not be found, although it clearly appeared to fall within the principle upon which the jurisdiction was originally founded. This remedy is provided for in the Code of Civil Procedure,[4] though it has been broadened considerably, it being the intention of the legislature not only to secure to expectant litigants all the relief formerly afforded by courts of equity, but even ampler relief and upon easier terms.[5]

§ 37. Cases in Which Allowed.—The disposition to amplify the equitable remedy is plainly apparent. Equity would entertain a suit to perpetuate testimony when there was but a single witness to a fact material in expected litigation, or when a witness was past seventy, or dangerously ill—in other words, when there was danger that the evidence might be lost by the death of the witness.[6] Under the provisions of the Code of Civil Procedure all that is necessary to warrant the proceedings is that the applicant, or petitioner, expects to become a party to a suit in the courts of California, or, if no suit is anticipated, that the proof of some fact is necessary to perfect title to property in which he is interested, or to establish marriage, descent, heirship, "or any other matter which may hereafter become material to establish."[7]

§ 38. Petition, Notice, Commission and Interrogatories. The proceedings are initiated by a verified petition presented to a judge of a superior court, or showing the ground for its institution, and the name and residence of the witness, and a general outline of the facts to be proven. On presentation of the petition, the judge is required to make an order allowing the examination, and designating an officer before whom the testimony must be

4. Code Civ. Proc., § 2083.

5. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 339.

6. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 359.

7. Code Civ. Proc., § 2084.

taken, and the county clerk to whom the deposition must be returned, and also prescribing the notice to be given. If the adverse parties are known and reside in the state, the notice must be personally served. If they are unknown, it must be served on the clerk of the county where the property affected is situated or where the judge making the order resides, as he may direct; and must also be published in a newspaper designated by the judge for the same period as required for a summons.[8] Where the testimony is to be taken in another state, the judge must also issue a commission for the purpose, under the seal of his court, and accompanied by interrogatories to be settled in the same manner as in the case of ordinary depositions taken out of the state, unless the parties, if known, otherwise agree. If the parties are unknown, notice of the settlement is to be published for such time as the judge may designate.[9]

§ 39. Taking and Return.—If a resident of the state, the person appointed to take the deposition is authorized, on receiving a copy of the judge's order and of the notice, with proof of service or publication,—or, of a resident without the state, on receiving the commission with proof of like service or publication of the notice,—to take the deposition of the witness or witnesses named, or such of them as appear before him at the appointed time. The taking may be continued from time to time.[10] The examination must be by question and answer, and the deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the person taking it, and sealed up and delivered or transmitted to the clerk of the county designated in the judge's order, who shall file it. The judge must also file with the clerk his order, the petition of the applicant, and the proof of service of the "order and notice."[11] These papers filed

8. Code Civ. Proc., § 2084.
9. Code Civ. Proc., § 2086.
10. Code Civ. Proc., § 2085.
11. Code Civ. Proc., § 2086.

by the judge, or certified copies of them, are prima facie evidence of the facts stated in them, to show compliance with the code.[12]

§ 40. Use and Effect.—As to the use of the deposition as evidence, it is provided that

"If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of his death, or insanity of the witnesses, or that they cannot be found, or are unable, by reason of age or other infirmity, to give their testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attended at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination."[13]

"The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness, or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial."[14]

IX. In Criminal Cases.

§ 41. In General.—While the constitution of California contains no provision guaranteeing the right to a defendant in a criminal case of being confronted by the witnesses against him, the right is accorded him by the Penal Code, with certain exceptions in case of testimony taken at the preliminary examination or a former trial.[15] The constitution, however, expressly sanctions the use of depositions in criminal cases, under certain limitations. Thus it declares that

12. Code Civ. Proc., § 2087.
13. Code Civ. Proc., § 2088.
14. Code Civ. Proc., § 2089.
15. See CRIMINAL LAW, vol. 7, p. 930.

"The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases other than cases of homicide, where there is reason to believe that the witness, from inability or other cause, will not attend at the trial."[16]

While it may be that by reason of the exception herein of homicide cases depositions cannot be used against a defendant in such a case, even though they were taken in his presence and with full opportunity for cross-examination, this provision does not impose any prohibition on the legislature to authorize the taking of depositions by the defendant himself in every class of criminal cases, as its whole tenor shows it to have been intended for the protection of the defendant. Hence, a defendant in a murder case may read depositions he himself has caused to be taken, even though he was not present in person when they were taken.[17] However, the mere fact that he has such right will not justify a court in refusing a continuance to procure the attendance of a material witness.[18]

§ 42. Where Witness is Within State.—Under the provisions of the Penal Code a defendant who has been held to answer for a public offense may in all cases, and the people, in other than homicide cases may, either before or after an indictment or information, have a witness "conditionally examined,"[19] when he is a material witness and "is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend the trial." In such case the defendant or the people may apply for an order that the witness be examined conditionally.[20] The application must be made on an affidavit stating: 1. The nature of the offense charged; 2. The state of the proceedings in the action; 3. The name and residence of the witness, and that

16. Const., art. 1, § 13.
17. People v. Hurtado, 63 Cal. 288.
18. People v. Dodge, 28 Cal. 445.
19. Pen. Code, § 1335.
20. Pen. Code, § 1336.

his testimony is material to the defense or the prosecution of the action; 4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial.[1] The application may be made to the court or judge, and must be on three days' notice to the opposite party.[2] If the court or judge is satisfied that the examination of the witness is necessary, he must make an order that the witness be examined conditionally, at a specified time and place, and before a designated magistrate.[3]

For use on motion for new trial.—If a witness refuses to make an affidavit for use on a motion for a new trial in a criminal case, and the court refuses to hear his oral testimony, it would seem that the defendant would have the right to take his deposition under subdivision 5 of section 204 of the Code of Civil Procedure.[4]

§ 43. Where Witness is a Prisoner.—Section 1346 of the Penal Code provides for the taking of the deposition of a witness who is in the state prison or in the county jail of another county.[5] The right of the defendant under this provision to take the deposition of a prisoner is not absolute, but rests in the discretion of the trial court. But the statute does not on that account violate the constitutional guarantee of right to process to compel the attendance of witnesses, as the provision guaranteeing such right is limited by the constitutional provision authorizing the legislature to provide for the taking of depositions in criminal cases. No provision, however, is made for taking the deposition of a prisoner as a witness on behalf of the people, the defendant having the right to be confronted with the witnesses against him.[6]

1. Pen. Code, § 1337.
2. Pen. Code, § 1338.
3. Pen. Code, § 1339.
4. People v. Sullivan, 129 Cal. 557, 62 Pac. 101. As to proceedings on new trial in criminal cases, see CRIMINAL LAW, vol. 8, p. 414.
5. Pen. Code, § 1346.
6. Willard v. Superior Court, 82 Cal. 456, 22 Pac. 1120. As to right

§ 44. Where Witness is Without State.—Under the provisions of the Penal Code, when an issue of fact is joined upon an indictment or information,[7] and when a material witness for the defendant resides out of the state, the defendant may apply for an order that the witness be examined on a commission.[8] The application must be made upon affidavit stating: 1. The nature of the offense charged; 2. The state of proceedings in the action, and that an issue of fact has been joined; 3. The name of the witness and that his testimony is material to the defense of the action; 4. That the witness resides out of the state.[9] It may be made to the court or judge, and must be upon three days' notice to the district attorney.[10] If the court is satisfied of the truth of the facts stated, and that the examination of the witness is necessary "to the attainment of justice," it must order the commission to issue, and may insert in the order a provision for a continuance of the case till the commission can be returned.[11] It is immaterial in this connection whether the witness resides in another state or in a foreign country,[12] though in the latter case the court may refuse a commission if the facts sought to be proved are admitted by the people.[13] The court may also refuse a commission where

of confrontation by witnesses, see CRIMINAL LAW, vol. 7, p. 930. As to right to compulsory process to compel attendance of witnesses, see WITNESSES.

7. Pen. Code, § 1349.

8. Pen. Code, § 1350.

9. Pen. Code, § 1352.

10. Pen. Code, § 1353.

11. Pen. Code, § 1354.

The Penal Code defines a commission as follows: "A commission is a process issued under the seal of the court and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath on interrogatories annexed thereto to take and certify the deposition of the witness, and to return it according to the directions given with the commission." Pen. Code, § 1351.

12. People v. Lundquist, 84 Cal. 23, 24 Pac. 153. See People v. Francis, 38 Cal. 183, holding that under the Criminal Practice Act, a defendant had no right to take the deposition of a witness residing in a foreign country.

13. People v. Young, 108 Cal. 8, 41 Pac. 281 (where the insanity of defendant's father and sister, which he sought to prove, was admitted by the people).

the affiant merely believes that the witness will testify to defendant's insanity, or where the witness is expected to testify to defendant's condition many years previously and the defendant appears to have overcome his afflictions.[14] But it should direct the issuance of a commission where it appears that the witness will give material evidence relating to the insanity of the defendant.[15] An order refusing to issue a commission is not an appealable order, though it may be reviewed on appeal from the judgment.[16] If on review it appears that the refusal was placed on the mistaken ground of want of jurisdiction, the refusal cannot be justified on the theory that it was discretionary with the court to approve the showing made, since no such discretion was exercised.[17]

On obtaining the order, the defendant must serve on the district attorney, without delay, a copy of his interrogatories, with two days' notice of the time they will be presented to the court or judge for settlement. The district attorney may similarly serve cross-interrogatories, "with like notice." Any pertinent question may be included in the interrogatories. When the interrogatories, direct and cross, are presented to the court or judge, pursuant to the notice, the latter must modify them to conform to the rules of evidence, indorse his allowance on them, and annex them to the commission.[18] And unless the parties otherwise consent, the court or judge must indorse upon the commission a direction as to the manner in which it must be returned.[19]

§ 45. Attendance and Examination of Witness—Authentication.—The attendance of a witness within the state, at the taking of his deposition in a criminal case, may be enforced by a subpoena issued by the magistrate

14. People v. Young, 108 Cal. 8, 41 Pac. 281.

15. People v. Lundquist, 84 Cal. 23, 24 Pac. 153.

16. People v. Stillman, 7 Cal. 117.

17. People v. Lundquist, 84 Cal. 23, 24 Pac. 153.

18. Pen. Code, § 1355.

19. Pen. Code, § 1356.

before whom it is taken.[20] The defendant has the right to be present in person and by counsel. If he is in custody his official custodian must be informed of the time and place of the examination and must take the defendant there and keep him in the presence and hearing of the witness.[1] If it is shown to the satisfaction of the magistrate that the witness is not about to leave the state, or is not sick or infirm, or that the application was made to avoid his examination on the trial, the examination cannot take place.[2] The testimony must be reduced to writing and "authenticated in the same manner as the testimony of a witness taken in support of an information."[3] Depositions need not be entitled in the cause, and any error in the title to them is immaterial if they intelligibly refer to the cause or proceeding in which taken.[4]

Before commissioner.—When a deposition is taken outside the state the manner in which the commissioner is to execute the commission is fixed by the Penal Code.[5]

Effect of stipulation.—A deposition in a criminal case taken under the stipulation of defendant's counsel, is to be governed by the stipulation and not by the provisions of the Penal Code. Hence a certificate to the deposition, not called for by the stipulation, is unnecessary.[6]

§ 46. **Return.**—When taken in the state, the deposition "must, by the magistrate, be sealed up and transmitted to the clerk of the court in which the action is pending or may come for trial."[7] When taken out of the state, the commissioner, after annexing the deposition, together with papers and documents proved by the witness, to the commission, "must close it up under seal and address it as directed by the indorsement thereon. . . . If there be a

20. Pen. Code, § 1342.
1. Pen. Code, § 1340.
2. Pen. Code, § 1341.
3. Pen. Code, § 1343. See CRIMINAL LAW, vol. 7, p. 976 et seq.
4. Pen. Code, § 1401.
5. Pen. Code, § 1357.
6. People v. Grundell, 75 Cal. 301, 17 Pac. 214.
7. Pen. Code, § 1344.

direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest post-office. If any other direction be made by the written consent of the parties, or by the court or judge, on the commission, as to its return, the commissioner must comply with the direction."[8] If the commissioner has delivered the deposition to an agent, the latter must deliver it to the clerk or judge of the court where the action is pending, who is to receive and open it on the agent's affidavit that he got it from the commissioner and that it has not been opened or altered.[9] If the agent is sick or dead, or from other casualty unable to make the delivery, the clerk or judge may receive it from any other person, on his affidavit of that fact, and of the fact that it has not been opened or altered since the affiant received it, and he believes it has not been since it came from the commissioner.[10] On being received, the deposition must be immediately filed, with the agent's affidavit, if any, and it must remain there unless otherwise directed by the court or judge.[11] "The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same or of any part thereof, on payment of his fees."[12]

§ 47. **Use in Evidence.**—"The deposition [taken within the state], or a certified copy thereof, may be read in evidence by either party on the trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the state. Upon reading the deposition in evidence, the same objections may be taken to a question or answer contained therein as if the witness had been examined orally in court."[13] "The depositions taken under the commission may be read in evidence by either

8. Pen. Code, § 1357.
9. Pen. Code, § 1358.
10. Pen. Code, § 1359.
11. Pen. Code, § 1360.
12. Pen. Code, § 1361.
13. Pen. Code, § 1345.

party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in court."[14] In view of this last provision, a party cannot insist that these depositions are to be treated as absolute and incontrovertible proof of the facts testified to.[15] An objection to a question in a deposition taken on behalf of defendant in a criminal case, that it is not in statutory form, may properly be made at the trial, if no attorney for the prosecution was present at the taking of the deposition.[16] A stipulation made in a criminal prosecution, by defendant's counsel, in open court, that the deposition of a witness detained in custody may be taken in a specified manner, and read in evidence on the trial with the same force and effect as if the witness were present and testifying, is an express consent that the deposition may be read at the trial, and this may be done, under the stipulation, without showing that the witness cannot be produced.[17]

The jury in a criminal case may not take depositions with them on retiring for deliberation.[18]

14. Pen. Code, § 1362.

15. People v. Leyshon, 108 Cal. 440, 41 Pac. 480.

16. People v. Gillis, 97 Cal. 542, 32 Pac. 586.

17. People v. Grundell, 75 Cal. 301, 17 Pac. 214.

18. Pen. Code, § 1137. See CRIMINAL LAW, vol. 8, p. 391.

(C. M.)

DEPOSITS.

See BANKS, vol. 4, p. 92; BAILMENTS, vol. 4, p. 1; FUNDS AND DEPOSITS IN COURT; WAREHOUSES.

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I. Introductory.

§ 1. Definitions.—While the word "succession" is sometimes used in other senses,[1] in connection with the descent of property on the death of the owner, the term is defined in the Civil Code as "the coming in of another to take the property of one who dies without disposing of it by will."[2] This definition has been supplemented in the decided cases by the classic one of Blackstone, namely, that "descent or hereditary succession is the title whereby a man, on the death of his ancestor, acquires his estate by

1. Chambers v. Lamb, 186 Cal. 261, 199 Pac. 33, holding the word "succession" in the inheritance tax law has a broader meaning than the definition in section 1383 of the Civil Code, and is synonymous with transfer.

2. Civ. Code, § 1383.

right of representation as his heir at law."[3] "An heir, therefore," continues Blackstone, "is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance."[4] While the word "heir" has a wide significance and is sometimes used to denote one who takes by descent from an ancestor, through the media of several intervening descents,[5] it is frequently used in a narrower sense as denoting a person to whom an estate of inheritance has descended from his immediate ancestor. And it has been held that one who is entitled to the estate of a dead person as heir of an intermediate decedent does not succeed to the estate of the former within the meaning of section 1383 of the Civil Code.[6] The word "heirs" cannot be construed to include devisees,[7] the latter taking by purchase rather than by descent.[8]

Inheritance per capita and by representation.—Inheritance by representation is defined by section 1403 of the Civil Code, as follows: "Inheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living."[9] This term is used in opposition to that of inheritance per capita, which denotes that method of dividing an intestate estate by which an equal share is

3. Estate of Donahue, 36 Cal. 329; Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 350, 107 Pac. 335 (saying that the fact that the code uses the word "succession" does not change the technical meaning of "descent").

4. Quoted in Estate of Donahue, 36 Cal. 329.

The word "heirs" is a technical term, and in its technical sense means those entitled, on a person's death intestate, to succeed to his estate by virtue of the statute of succession. Estate of Wilson, 184 Cal. 63, 193 Pac. 581; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547.

5. Castro v. Tennent, 44 Cal. 253.

6. Estate of Wakefield, 136 Cal. 110, 168 Pac. 499.

7. Estate of McGee, 154 Cal. 204, 97 Pac. 299.

8. Estate of Donahue, 36 Cal. 329.

9. See Estate of Healy, 176 Cal. 244, 168 Pac. 124 (reiterating this statutory definition).

given to each of a number of persons, all of whom stand in equal degree to the decedent.[10]

§ 2. **Scope of Article.**—The present article deals with the descent of ordinary property, in the manner and to the persons appointed by statute, upon the death of the owner without having disposed of it by a valid testament. It covers the shares apportioned to each, and the rights and obligations thereby acquired and incurred. Necessarily it excludes all matters pertaining to the testamentary disposition of property, the rights of devisees and legatees, and also the rights of pretermitted heirs.[11] The devolution of particular kinds or classes of property, such as community property and homesteads, is excluded,[12] as is also the right of particular classes of persons to claim as heirs, such as aliens,[13] children by adoption,[14] divorced persons,[15] and illegitimates.[16] All questions of procedure pertaining to the administration and distribution of the estates of decedents, including proceedings to determine heirship, and the making and effect of the decree of distribution, are dealt with elsewhere.[17] And the subjects of advancements[18] and conflict of laws in regard to decedent's estates[19] are elsewhere discussed.

§ 3. **Survey of California Law.**—At the time of the cession of California to the United States by Mexico in 1848, the rules of succession governing the estates of decedents were those of the Mexican law, and these rules continued in force after the organization of the state

10. Black's L. Dict. See 9 Ruling Case Law, pp. 30, 31. See infra, § 13.

11. See EXECUTORS AND ADMINISTRATORS; WILLS.

12. See COMMUNITY PROPERTY, vol. 5, p. 362; HOMESTEADS.

13. See ALIENAGE AND CITIZENSHIP, vol. 1, pp. 921–927.

14. See ADOPTION, vol. 1, pp. 448–551.

15. See DIVORCE AND SEPARATION.

16. See ILLEGITIMACY.

17. See EXECUTORS AND ADMINISTRATORS.

18. See ADVANCEMENTS, vol. 1, pp. 475–483.

19. See CONFLICT OF LAWS, vol. 5, pp. 473, 480.

government and until legislation was had governing the descent and distribution of such estates.[20] A statute of descents was first enacted in 1850,[1] which, after modification in 1862,[2] became a part of the Civil Code.[3] This law of succession, it has been said, is based on the general sentiments of mankind, and not on the obsolete feudal reasons on which the common-law doctrine of inheritance of real estate was based.[4] Indeed, the common-law rules, by which real estate, on the owner's death, vested in the heir and personalty in the personal representative, never have obtained in California, title to all property, whether real or personal, vesting at once in the heir as under the Mexican system, though subject to the claims of administration.[5] And it is not too much to say that the whole law of succession in this state reflects the genius of the civil, rather than of the common, law.

§ 4. **Theory of Right of Inheritance.**—The right of inheritance is not an inherent or natural right,[6] but one which exists only by virtue of statute providing therefor.[7] Such being the case, the whole subject of dealing with the estates of decedents,[8] including the designation

20. McNeil v. First Congregational Society, 66 Cal. 105, 4 Pac. 1096; Coffinger v. Rice, 33 Cal. 408; Soto v. Kroder, 19 Cal. 87.

1. Stats. 1850, p. 219.

2. Stats. 1862, p. 569.

3. See Civ. Code, § 1386 et seq.

4. Estate of Smith, 131 Cal. 433, 82 Am. St. Rep. 358, 63 Pac. 729.

5. See infra, § 19.

6. In re Watt's Estate, 179 Cal. 20, 175 Pac. 415; Brenham v. Story, 39 Cal. 179.

7. McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681; Estate of Bump, 152 Cal. 274, 92 Pac. 643; Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78, 61 Pac. 659; Estate of Stanford, 126 Cal. 112, 45 L. R. A. 788, 54 Pac. 259, 58 Pac. 462; Estate of Donnelly, 125 Cal. 417, 73 Am. St. Rep. 62, 58 Pac. 61; Sharp v. Loupe, 120 Cal. 89, 52 Pac. 134, 586; In re Wilmerding's Estate, 117 Cal. 281, 49 Pac. 181; In re Marshall's Estate, 42 Cal. App. 683, 184 Pac. 43.

8. Estate of Hill, 179 Cal. 683, 178 Pac. 710; In re Darling, 173 Cal. 221, 159 Pac. 606; Estate of Johnson, 164 Cal. 312, 43 L. R. A. (N. S.) 1062, 128 Pac. 938; Estate of Kirby, 162 Cal. 91, Ann. Cas. 1913C, 928, 39 L. R. A. (N. S.) 1088, 121 Pac. 370; McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681; Estate of De Cigaran, 150 Cal. 682, 89 Pac. 833; Estate of Strong, 119 Cal. 663, 51

of heirs and the proportions which the several heirs shall receive,[9] is entirely within the control of the legislature, subject to the constitutional prohibition against special legislation.[10] It follows that the rules of succession cannot be changed by the courts,[11] irrespective of what may be their own ideas of natural right and justice.[12] It is vain to argue against the injustice of statutory provisions fixing the succession.[13] Inasmuch as the right of inheritance is not a vested right but a mere expectancy,[14] it is competent for the legislature to change the rule of inheritance,[15] and to provide, as it has done, that the heir shall take the inheritance subject to certain burdens, such as the payment of the debts of the deceased, and the right of the court to appropriate a portion of the estate to the support of the family during administration.[16] So, also, the legislature may attach to the right of inheritance the condition that a portion of the estate so received shall be contributed to the state,[17] and may make the deprivation of the right to inherit a part of the punishment of crime.[18]

Pac. 1078; In re Ingram, 78 Cal. 586, 12 Am. St. Rep. 80, 21 Pac. 435; Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 350, 107 Pac. 335; Estate of Barrett, 6 Cof. Prob. Dec. 398; Estate of Barrett, 5 Cof. Prob. Dec. 376. See CONSTITUTIONAL LAW, vol. 5, p. 882.

The power of government to provide for the descent and distribution of the property of intestates, both real and personal, is unquestioned. Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78, 61 Pac 659.

9. Estate of Stanford, 126 Cal. 112, 45 L. R. A. 788, 54 Pac. 259; In re Wilmerding, 117 Cal. 281, 49 Pac. 181.

10. See CONSTITUTIONAL LAW, vol. 5, pp. 802, 803, note 2, 807.

11. In re Ingram, 78 Cal. 586, 12 Am. St. Rep. 80, 21 Pac. 435.

12. Estate of Kirby, 162 Cal. 91, Ann. Cas. 1913C, 928, 39 L. R. A. (N. S.) 1088, 121 Pac. 370; Estate of De Cigaran, 150 Cal. 682, 89 Pac. 833.

13. In re Ingram, 78 Cal. 586, 12 Am. St. Rep. 80, 21 Pac. 435.

14. See infra, § 19.

15. Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 350, 107 Pac. 335. See infra, § 20, however, as to power of legislature to impair rights of heir after death of ancestor has caused title to vest in him.

16. Brenham v. Story, 39 Cal. 179. See infra, § 20.

17. In re Wilmerding, 117 Cal. 281, 49 Pac. 181. See TAXATION.

18. See infra, § 17.

II. INHERITABLE PROPERTY.

§ 5. In General.—The Civil Code declares that "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration."[19] While this section treats of the acquisition of property of deceased persons not disposed of by will, it does not follow that the test of inheritable property is that it may be disposed of by will. On the contrary, the chapter of the code relating to succession follows that relating to wills, and means that the only other method of acquiring the estate of a deceased owner is by succession and it must be applied to all cases which the language is broad enough to cover. Thus infants and insane persons cannot exercise testamentary power, but their property passes on their death in accord with the statutes relating to succession. So, also, it has been held that while the title to community property is in the husband, he has no testamentary power to dispose of the wife's moiety, yet it nevertheless passes to her by succession.[20] In short, anything which was possessed or enjoyed by the deceased, of whatever nature, must and ought to pass by succession if not disposed of by will.[1] At common law an equitable estate might be an estate of inheritance;[2] and this is also true in California.[3] Thus the equity in one who has been fraudulently induced to convey his property is inheritable property which

19. Civ. Code, § 1384.

20. Estate of Simonton, 183 Cal. 53, 190 Pac. 442; Estate of Moffitt, 153 Cal. 359, 20 L. R. A. (N. S.) 207, 95 Pac. 653, 1025; In re Burdick, 112 Cal. 387, 44 Pac. 734; Estate of Warner, 6 Cal. App. 361, 92 Pac. 191. Contra, Estate of Ricaud, Myrick's Prob. Reports, 158. See COMMUNITY PROPERTY, vol. 5, pp. 363, 364, as to rule where wife dies.

1. Grover v. Hawley, 5 Cal. 485.

2. Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

3. Page v. Garver, 146 Cal. 577, 80 Pac. 860; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Jones v. Throckmorton, 57 Cal. 368.

passes to his heirs, so they may assert their interest and attack the conveyance.[4] Future interests pass by succession,[5] as does the interest of the beneficiary in a policy of life insurance.[6] So, also, the possession of real property by a decedent at the time of his death is sufficient to throw the descent, and prima facie title at least, upon his heirs.[7]

The inheritability of community[8] and homestead[9] property is elsewhere discussed.

§ 6. Claims Under Land Laws of United States.—Former section 2269 of the Revised Statutes of the United States, providing that where a party entitled to claim the benefit of the pre-emption laws dies before consummating his claim, the personal representative or an heir may file the requisite papers, and the patent shall cause title to inure to the heirs. Under this section the right of the entryman did not constitute inheritable property, and the heirs take by purchase, not by descent, the title being conveyed directly to them by the government.[10] But this rule does not apply to mining claims, for the federal statute gives locators the exclusive right to possession and enjoyment. The mining claim is property in the fullest sense of the word and on death of the locator passes

4. Page v. Garver, 146 Cal. 577, 80 Pac. 860.

5. Civ. Code, § 699.

6. Crowe v. Dobbel, 105 Cal. 350, 38 Pac. 957; In re Dobbel's Estate, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87, holding that a policy of insurance on the life of a husband in which the wife is named as beneficiary is a property right in her which on her death descends to her heirs, including the husband himself.

"A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered. Civ. Code, § 2764.

7. Gregory v. McPherson, 13 Cal. 562.

8. See COMMUNITY PROPERTY, vol. 5, p. 362.

9. See HOMESTEADS.

10. Wittenbroch v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Cooper v. Wilder, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591. But see Grover v. Hawley, 5 Cal. 485; U. S. Rev. Stats., § 2269, repealed by Act of March 3, 1891, c. 561.

to his heirs by descent.[11] It has been also held that the right of enjoyment of possession of public lands may descend to the personal representative of the deceased,[12] and further, that the equity which an occupant of lots in a town site entered in the United States land office, under the acts of Congress providing for the reservation of town sites upon public lands of the United States, passes to the heirs of the occupant.[13]

III. PERSONS WHO TAKE AND THEIR SHARES.

§ 7. In General—Presumption of Heirs.—Since, as has already been seen, the right to inherit is statutory, anyone who claims such right must bring himself strictly within the terms of the statute.[14] The statute covering ordinary cases is section 1386 of the Civil Code. But inasmuch as the introductory clause of this section limits its application to cases not otherwise expressly provided for in the Civil Code or the Code of Civil Procedure, any rules laid down for special cases, in the latter code are paramount.[15] It has been said of this section that it does not purport to be legislation for the heirs of an intestate, or to make a classification of heirs with reference to any legislative object. Its subject matter is the estate of a person dying intestate and the designation of the persons who shall succeed thereto, under the various conditions liable to exist at his death. The enumeration of heirs in its various sections is not a classification of them for any legislative purpose, especially as different subdivisions,

11. Rev. Stats., § 2322, 6 Fed. Stats. Ann., 2d ed., 523; Wallace v. Hudson, 170 Cal. 596, 150 Pac. 988; Hardenbergh v. Bacon, 33 Cal. 356. As to law relating to mines in general, see MINES AND MINERALS.

12. Grover v. Hawley, 5 Cal. 485.

13. Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 461.

14. Estate of Caffrey, 5 Cof. Prob. Dec. 439. See supra, § 4.

15. Wolf v. Gall, 62 Cal. App. 286, 163 Pac. 346, 350; Estate of De Cigaran, 150 Cal. 682, 89 Pac. 833 (case of illegitimacy).

dealing with different conditions, enumerate the same heirs.[16]

The statute of succession, in providing for the disposition of the separate property of one dying intestate, makes no distinction based upon the channel through which the property may have come to the decedent,[17] except in subdivision 8, where the property in question is community property received from a predeceased spouse.[18]

Law governing.—The question as to what persons are entitled to succeed to the estate of another is to be determined with reference to the statutes in force at the time of the latter's death.[19]

Rights of posthumous children.—"A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."[20] It is considered as living at the death of its parents.[1]

§ 8. Where Deceased Leaves a Spouse and Issue.—Section 1386 of the Civil Code provides:

"When any person having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the Code of Civil Procedure, subject to the payment of his debts, in the following manner: 1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child,[2] or issue of such child. If the

16. In re Wilmerding, 117 Cal. 281, 49 Pac. 181 (holding that the legislature, in imposing an inheritance tax, is not bound to distribute its burdens in accordance with the enumeration of heirs made in the several subdivisions of the section).

17. Estate of Jobson, 164 Cal. 312, 43 L. R. A. (N. S.) 1062, 128 Pac. 938.

18. See infra, § 14.

19. Estate of Loyd, 170 Cal. 85, 148 Pac. 522.

20. Civ. Code, § 29.

1. Civ. Code, § 1403.

2. Estate of Glann, 177 Cal. 347, 170 Pac. 833; Estate of Lindsay, 176 Cal. 238, 168 Pac. 113. As to right of adopted child under this provision, see ADOPTION, vol. 1, pp. 448–451.

decedent leaves a surviving husband or wife, and more than one child living,[3] or one child living and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue;[4] and if such issue consists of more than one child living,[5] or one child living and the lawful issue of one or more deceased children,[6] then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation";

The explicit character of these provisions has left little occasion for construction by the courts, which usually content themselves with reiterating the clause applicable to the case before them. Of course, the provisions of this subdivision apply only to the separate property of a married person,[7] the devolution of community property being provided for elsewhere.[8] Yet where an intestate dies leaving a wife and one child, the character of the property

3. Campbell – Kawannanakoa v. Campbell, 152 Cal. 201, 92 Pac. 184; Byrne v. McGrath, 130 Cal. 316, 80 Am. St. Rep. 127, 62 Pac. 559; Beck v. Soward, 76 Cal. 527, 18 Pac. 650; Crowe v. Dobbel, 105 Cal. 350, 38 Pac. 957 (applying rule to death of wife who was beneficiary in a policy of life insurance); In re Dobbel, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87 (applying rule to death of wife named as beneficiary of insurance policy, and holding that the fact that administration of the wife's estate was not had till after the husband's death would not affect his right as heir to a one-third interest in the policy).

4. Estate of Wilson, 184 Cal. 63, 193 Pac. 581; Estate of De Cigaran, 150 Cal. 682, 89 Pac. 833.

5. Estate of McKenna, 168 Cal. 339, 143 Pac. 605.

6. Two grandchildren of decedent, representing a deceased parent, who was one of decedent's five children take each a tenth of decedent's estate. Solomon v. Redona, 34 Cal. App. Dec. 1039, 198 Pac. 643.

7. Civ. Code, § 1400.

8. See Civ. Code., § 1401, 1402; COMMUNITY PROPERTY, vol. 5, p. 362.

left by him, whether community or separate, is immaterial, since in either case it will be equally divided between the wife and child.[9] The husband is heir, along with the children, of a deceased wife,[10] and whatever interest the wife takes in her husband's separate property, she takes as heir.[11]

§ 9. Spouse and Parent or Brother and Sister.—Under subdivision 2 of section 1386 of the Civil Code

"If the decedent leaves no issue, the estate goes one-half to the surviving husband or wife, and the other half to the deceased's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead then to the other."[12]

Under this subdivision, the mother is the sole heir of a decedent who leaves neither spouse, issue, nor father surviving,[13] and this whether or not the decedent acquired the property before or after the death of his spouse.[14] Neither the brothers and sisters[15] nor a cousin[16] of the

9. In re Buchanan's Estate, 8 Cal. 507. See COMMUNITY PROPERTY, vol. 5, p. 364.

10. Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547.

11. Estate of Warner, 6 Cal. App. 361, 92 Pac. 191.

12. In re Arms' Estate, 186 Cal. 554, 199 Pac. 1053; Estate of Dargie, 179 Cal. 418, 177 Pac. 165; Estate of Jobson, 164 Cal. 312, 43 L. R. A. (N. S.) 1062; Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430; Estate of Claiborne, 158 Cal. 646, 112 Pac. 278; Estate of Bose, 158 Cal. 428, 111 Pac. 258; Estate of McGee, 154 Cal. 204, 97 Pac. 299. See infra, § 10, as to the applicability of the Ingram rule to this subdivision.

13. Estate of Glann, 177 Cal. 347, 170 Pac. 833; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269. This was also the rule of the Mexican law. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

14. Estate of Page, 181 Cal. 537, 185 Pac. 383.

15. O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

16. In re Eggers' Estate, 114 Cal. 464, 46 Pac. 380.

decedent is an heir under such circumstances. The words "father" and "mother" as used herein, include parents by adoption.[17]

§ 10. Brothers and Sisters or Their Issue.—Subdivision 3 of section 1386 of the Civil Code reads:

"If there is neither issue, husband, wife, father, nor mother then [the property of an intestate must go] in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation."[18]

A second cousin of decedent is not an heir when there is surviving a brother who would take under this subdivision.[19] As this subdivision stood prior to 1905, only children of a deceased brother or sister were mentioned as entitled to inherit by representation. And it was uniformly held that the term "children," as used herein, did not include grandchildren, who could not take under its provisions.[20] If grandchildren of a deceased brother or sister alone survived the decedent, the estate went to the next of kin under what is now subdivision 5, formerly subdivision 6.[1] In 1905, however, the words "or grandchildren" were inserted in the subdivision, thus in terms extending the right of inheritance to them.[2]

§ 11. Spouse—Ingram Rule.—Under subdivision 4 of section 1386 of the Civil Code,

"If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the

17. In re Darling's Estate, 173 Cal. 221, 159 Pac. 606; Estate of Jobson, 164 Cal. 312, 43 L. R. A. (N. S.) 1062, 128 Pac 938. See ADOPTION, vol. 1, p. 450.

18. See infra, § 11, as to the applicability of the Ingram rule to this subdivision.

19. In re Eggers' Estate, 114 Cal. 464, 46 Pac. 380.

20. Estate of Curry, 39 Cal. 529; Estate of Caffrey, 5 Cof. Prob. Dec. 439.

1. Estate of Caffrey, 5 Cof. Prob. Dec. 439. See infra, § 14.

2. Stats. 1905, p. 608.

children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife."[3]

Prior to the year 1905 this subdivision was numbered 5 and provided that if the decedent left a surviving spouse but no issue, parent, brother nor sister, the surviving spouse should take the whole estate. It therefore overlapped the second clause of the subdivision 2 of section 1386 of the Civil Code, providing that in case a decedent left a surviving spouse but no parent, one-half of his estate should go to his brothers and sisters and to the children or grandchildren of any deceased brother or sister by right of representation. This overlap led the supreme court, in an effort at reconcilement, to announce a technical rule of construction, which may be stated thus: Where a married person died without leaving issue, parent, brother or sister, but leaving a surviving spouse, and also children of a deceased brother or sister, that is, nephews or nieces, the surviving spouse took the whole estate under subdivision 5 as then existing, the right of the nephews and nieces to share in the property being contingent, under subdivision 2, on the accompanying survival of a brother or sister of the decedent. In other words, their right to inherit, to be effective, needed to be aided by the surviving presence of an uncle or aunt,—brother or sister of the intestate.[4] This rule, known from the case in which it was first announced as the Ingram rule,[5] was later declared by the supreme court to have become a rule of property.[6] It was sufficient, however, to avoid the rule and cast descent under subdivision 2, if

3. Knott v. McGilvray, 124 Cal. 128, 56 Pac. 789 (quoting code section); Estate of Barrett, 6 Cof. Prob. Dec. 398; Estate of Barrett, 5 Cof. Prob. Dec. 376.

4. Estate of Nigro, 149 Cal. 702, 87 Pac. 384; In re Carmody's Estate, 88 Cal. 616, 26 Pac. 373; In re Ingram's Estate, 78 Cal. 586, 12 Am. St. Rep. 80, 21 Pac. 435; Estate of Linehan, Myrick's Prob. Rep. 83.

5. It is so styled by Justice Lorigan in the dissenting opinion in Estate of Jepson, 174 Cal. 684, 164 Pac. 1.

6. Estate of Nigro, 149 Cal. 702, 87 Pac. 384.

the surviving brother or sister was only of the half blood of the decedent, though the parent of the nephews and nieces whose rights depended on his survival had been of the whole blood.[7] The Ingram rule was refused extension to cases falling under subdivision 8 (formerly subdivision 9) of section 1386 of the Civil Code.[8] But the rule was later extended to cases falling under the apparently conflicting provisions of subdivisions 3 and 5 (formerly 6), the former of which provides that if there is neither issue, spouse nor parent, the estate shall go to brothers and sisters and the children or grandchildren of a deceased brother or sister by right of representation, and the latter providing that if there be neither issue, spouse, parent, brother nor sister, the estate goes to the next of kin.[9]

In 1905, subdivision 5, which had occasioned the difficulty, was renumbered 4 and amended by enumerating among the relatives whose survivorship prevented the surviving spouse from claiming the whole estate, "the children or grandchildren of a deceased brother or sister," thereby harmonizing this subdivision with subdivision 2, and abrogating the Ingram rule as far as these two sections were concerned.[10] But as no similar amendment was effected as to subdivision 6, though it was renumbered 5, the Ingram rule must be regarded as still operative where "next of kin" claim against nephews and nieces themselves claiming by right of representation.

§ 12. On Death of Minor Heir.—Under subdivisions 6 and 7 of section 1386 of the Civil Code,

"If the decedent leaves several children, or one child and the issue of one or more children, and any such sur-

7. Estate of Lynch, 132 Cal. 214, 64 Pac. 284.

8. Estate of McCauley, 138 Cal. 546, 71 Pac. 458. See infra, § 13.

9. Estate of Nigro, 172 Cal. 474, 156 Pac. 1019 (holding that amendments to subdivisions 2 and 3, made in 1907, by which the right of inheritance by representation was extended to grandchildren, as well as children of a deceased brother or sister of decedent, did not affect the Ingram rule).

10. Estate of Jepson, 174 Cal. 684, 164 Pac. 1 (Justice Lorigan dissenting).

viving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by right of representation."[11]

"If at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them has left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation."[12]

These subdivisions refer only to property cast upon the dead minor by descent. If property comes to him by will, it is governed by such other subdivisions of section 1386 as are applicable.[13] They create an exception to the general rule announced in subdivision 2, as to inheritance by parents. Under subdivision 6, where a minor child inherits from his mother and dies unwed, his interest so inherited passes to his brothers and sisters, and his father takes nothing.[14]

§ 13. **On Death of Widow or Widower.**—Under subdivision 8 of section 1386 of the Civil Code, if the deceased, is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to designated heirs of such decedent and the other half goes

11. Civ. Code, § 1386, subd. 6.
12. Civ. Code, § 1386, subd. 7.
13. Estate of Donahue, 36 Cal. 329.
14. Moore v. Jones, 63 Cal. 12; De Castro's Estate v. Barry, 18 Cal. 96, 97.

to designated heirs of the deceased spouse. If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise or bequest, such property goes to designated heirs.[15] The subdivision is not a limitation upon testamentary power of a widow or widower,[16] or a restriction upon his or her power of disposition by gift inter vivos,[17] but is as much a part of the law of succession as any other rule.[18] While the relation of one to the predeceased spouse is sometimes the determining factor in fixing his status as heir, the title to

15. Estate of Watts, 186 Cal. 102, 198 Pac. 1036 (holding that it is the community property actually received by the surviving spouse which is to be divided, and that there is no force in the contention that the relatives of the predeceased spouse are to receive one-half of all the community property at his or her death); Estate of Ross, 185 Cal. 8, 195 Pac. 674; Estate of Ross, 180 Cal. 643, 182 Pac. 755 (holding that the surviving widow of a deceased brother of a deceased husband of the decedent cannot take directly from the latter under the provisions of subdivision 8, as she is not enumerated therein); Estate of Page, 181 Cal. 537, 185 Pac. 383; Estate of Hill, 179 Cal. 683, 178 Pac. 710 (holding the amendment to this section in 1905 was not unconstitutional. See CONSTITUTIONAL LAW, vol. 5, pp. 806, 807); Estate of Marshall, 176 Cal. 784, 169 Pac. 672 (holding that predeceased husband's heirs take one-half of widow's estate, which was community property); Estate of Marshall, 42 Cal. App. 683, 184 Pac. 43 (holding that community property received by a surviving spouse goes, on his death without issue, to the child of his predeceased spouse by a former marriage); Estate of Hill, 8 Cal. App. 286, 96 Pac. 918 (holding that a brother of predeceased husband has same interest in estate of widow dying childless, whose estate was made up of community property and that which was separate property of the husband, and hence he is entitled to letters of administration). Estate of Lenehan, Myrick's Prob. Rep. 83. See COMMUNITY PROPERTY, vol. 5, p. 366. See supra, § 11, as to applicability of Ingram rule to this subdivision.

16. Estate of Hill, 179 Cal. 683, 178 Pac. 710; Estate of Wenks, 171 Cal. 607, 154 Pac. 24; Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469; Veirs v. Roberts, 39 Cal. App. 684, 179 Pac. 689; Pickens v. Merriam, 274 Fed. 1.

17. Wright v. Rohr, 41 Cal. App. 265, 182 Pac. 469; Veirs v. Roberts, 39 Cal. App. 684, 179 Pac. 689; Pickens v. Merriam, 274 Fed. 1.

18. Estate of Wyman, 182 Cal. 645, 189 Pac. 267; Estate of Page, 181 Cal. 537, 185 Pac. 383; Estate of Watts, 179 Cal. 20, 175 Pac. 415; In re Marshall's Estate, 42 Cal. App. 683, 184 Pac. 43.

the property he is entitled to receive does not relate back to the predeceased spouse, but comes directly from the intestate.[19]

Property included.—One claiming the right to inherit under the first part of subdivision 8 of section 1386 of the Civil Code, as a relative of a predeceased spouse, has the burden of showing that the property was community property,[20] and was such at the death of the predeceased spouse. Since the portion of the subdivision relates only to separate property received by a surviving spouse by descent, devise or bequest, it follows that the portion relating to community property applies only to community property received by will or inheritance or retained by virtue of its character as community property. If the husband be the survivor, it applies to the community property which, as such, he retains without administration. If the wife be the survivor, it applies to such of the community property as she receives either by will or as her share of the estate.[1] It does not, therefore, apply to community property which was conveyed to the wife by the husband in his lifetime, and which thereby became her separate property,[2] or to a homestead, which vests in the surviving spouse by right of survivorship,[3] or to property, a widow receives as a family allowance, or as fees as the personal representative of the husband.[4] It applies, however, to the proceeds of community property sold or exchanged,[5] and to the rents, issues and profits thereof

19. In re Marshall's Estate, 42 Cal. App. 683, 184 Pac. 43.

20. Estate of Fleming, 162 Cal. 524, 123 Pac. 284.

1. Estate of Simonton, 183 Cal. 53, 190 Pac. 442. See Estate of Davidson, 21 Cal. App. 118, 131 Pac. 67, holding that the subdivision applies to community property devised to the wife.

2. Estate of McCauley, 138 Cal. 546, 71 Pac. 458.

3. Estate of Simonton, 183 Cal. 53, 190 Pac. 442 (homestead selected out of community property); Estate of Beer, 178 Cal. 54, 171 Pac. 1062 (homestead selected out of separate property); Pickens v. Merriam, 274 Fed. 1 (homestead set apart in administration proceedings, out of predeceased husband's separate property). See HOMESTEAD.

4. Estate of Simonton, 183 Cal. 53, 190 Pac. 442.

5. Estate of Brady, 171 Cal. 1, 151 Pac. 275; Pickens v. Merriam,

accruing during the life of the survivor from the natural and normal increase of the property itself.[6]

Since under the express language of the code the separate property of the predeceased spouse, to fall within this subdivision, must be such as the survivor has received by descent, devise or bequest, it follows that this subdivision does not apply to land vesting in the wife as a statutory substitute for dower under the law of another state, or to property of the predeceased husband which the widow has purchased from other heirs. Neither does it apply to property of his which has been so commingled with hers that its identity has been lost and cannot be traced.[7]

§ 14. Inheritance by Next of Kin.—Under subdivision 5 of section 1386 of the Civil Code,

"If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote."[8]

This subdivision applies, as its language shows, to cases where the decedent leaves neither issue, husband, wife, father, mother, brother nor sister surviving.[9] The term "next of kin" as used herein means next of kin to the decedent himself, not to an ancestor of his.[10] With reference to the share of each, a construction of the section leads to the conclusion that next of kin, however,

274 Fed. 1. See COMMUNITY PROPERTY, vol. 5, p. 294.

6. Estate of Brady, 171 Cal. 1, 151 Pac. 275.

7. Pickens v. Merriam, 274 Fed. 1.

8. See supra, § 11, as to the applicability of the Ingram rule to this subdivision.

9. In re Ross' Estate, 187 Cal. 454, 202 Pac. 641; Estate of Nigro, 172 Cal. 474, 156 Pac. 1019; In re Eggers' Estate, 114 Cal. 464, 46 Pac. 380.

10. In re Pearsons' Estate, 110 Cal. 524, 42 Pac. 960. See infra, § 16, as to inheritance by kindred of the half-blood.

remote, take per capita, not by representation. In every other subdivision in section 1386 of the Civil Code, the legislature carefully specified inheritance by right of representation, when inheritance in this manner was intended, and as representation was not mentioned in subdivision 5, it follows that the legislature intended that descent should go to all next of kin in equal degree per capita, and not by representation.[11]

§ 15. Computing Degree of Kindred.—In determining who are "next of kin in equal degree" reference must be had to sections 1389, 1390 and 1393 of the Civil Code. These sections are as follows:

"The degree of kindred is established by the number of generations, and each generation is called a degree."[12]

"The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity."[13]

"The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestor with those who descend from him. The second is that which connects a person with those from whom he descends."[14]

"In the direct line there are as many degrees as there are generations. Thus, the son is, with regard to the father, in the first degree; the grandson in the second, and vice versa with regard to the father and grandfather toward the sons and grandsons."[15]

"In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and

11. Estate of Nigro, 172 Cal. 474, 156 Pac. 1019.
12. Civ. Code, § 1389.
13. Civ. Code, § 1390.
14. Civ. Code, § 1391.
15. Civ. Code, § 1392.

nephew in the third degree; cousins german in the fourth, and so on."[16]

The rule of computation here laid down is that of the civil law, and prior to the adoption of the codes, and where statutes in derogation of the common law were still strictly construed, it was held that these rules could be applied only to determine degrees of relationship for purposes of succession, and not for any other purpose. In other cases computation was to be made according to the rules of the common law.[17] Since the adoption of the codes, however, the strict construction of statutes in derogation of the common law is expressly abolished.[18] And degrees of relationship for all legal purposes are determined by the rules declared in the above sections.[19] Under section 1393 above quoted, nephews and nieces are nearer in degree to the decedent than grandnephews and grandnieces,[20] and also nearer than a cousin once removed,[1] and take to the exclusion of them.

§ 16. Inheritance by Kindred of the Half-blood.—The Civil Code provides:

"Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance."[2]

This section deals entirely with the case of kindred of the half-blood;[3] that is to say, kindred of the half-blood

16. Civ. Code, § 1393.

17. People v. De La Guerra, 24 Cal. 73 (determining the disqualification of a judicial officer because of relationship to the parties).

18. See section 4 of each of the codes.

19. Robinson v. Southern Pac. Co., 105 Cal. 526, 28 L. R. A. 773, 38 Pac. 94, 722 (a case determining the disqualification of a judge by reason of relationship to the parties).

20. Estate of Ross, 187 Cal. 454, 202 Pac. 641; Estate of Nigro, 172 Cal. 474, 156 Pac. 1019.

1. Estate of Moore, 162 Cal. 324, 122 Pac. 844.

2. Civ. Code, § 1394.

3. In re Pearsons' Estate, 110

of the decedent.[4] Except in the particular instance mentioned in the concluding clause of this section, the general rights of kindred of half-blood are fixed by the general rules of succession, which are applicable to whole and half-blood alike. "The well-established rule in this country is, that where the term 'brothers or sisters' is used without limitation, it includes half-brothers and half-sisters, . . . This is the rule of the civil law, and has been generally adopted in this country."[5] The discrimination against the half-blood is the exception and is not to be extended beyond the obvious intent. And since the last clause in the section is an exception to the rule in the first clause, it follows that it applies only to the class described in the first, or in other words, to kindred "in the same degree." It does not apply, for example, to a case where a surviving husband and half-sisters of the decedent are the sole heirs, though the half-sisters are not of the blood of the ancestor from whom the property was inherited.[6] If the next of kin of equal degree of the intestate be some of the whole blood and some of the half-blood of the intestate, the half-blood shall not inherit if they are not of the blood of the person from whom the intestate inherited the property to be distributed, but if all be kin of the whole blood of the intestate, or if the half-bloods be of the blood of the ancestor, then all share alike.[7] The limitation has no application where the decedent is the widow of two former husbands, leaving a child by each marriage, for though the children are kindred of the half-blood as to each other, they are each of the whole blood of the mother,—the decedent, consequently the fact that

Cal. 524, 42 Pac. 960, holding the antecedent of the words "all those" is "kindred of the half-blood."

4. Estate of McKenna, 168 Cal. 339, 143 Pac. 605; In re Pearsons' Estate, 110 Cal. 524, 42 Pac. 960.

5. Estate of Lynch, 132 Cal. 214, 64 Pac. 284; Estate of Smith, 131 Cal. 433, 82 Am. St. Rep. 358, 63 Pac. 729.

6. Estate of Smith, 131 Cal. 433, 82 Am. St. Rep. 358, 63 Pac. 729.

7. In re Pearsons' Estate, 110 Cal. 524, 42 Pac. 960.

decedent received the property by gift from her last husband does not affect the succession.[8]

§ 17. Inheritance by Murderer or One Civilly Dead.—"No person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate, but the portion thereof to which he would otherwise be entitled to succeed descends to the other persons entitled thereto, under the provisions of" the Civil Code.[9] To forfeit the right of inheritance under this section, there must have been an actual conviction of the heir, for the murder of the ancestor.[10] Indeed, it has been held that an heir convicted of manslaughter in connection with the death of his ancestor is not excluded from the inheritance, there being a clear distinction between manslaughter and murder.[11]

One who is civilly dead is dead in law in respect to his estate, as if he was dead in fact, and he cannot inherit property any more than he could if dead in fact. Inasmuch as the right of inheritance exists only by virtue of the law, the legislature has undoubted power to make the deprivation of this right a portion of the penalty to be imposed for the commission of crime.[12]

§ 18. Where One has No Heirs—Escheat.—Since it is presumed that things happen according to the ordinary course of nature,[13] the law presumes that a decedent leaves heirs capable of succeeding to the estate,[14] and particularly

8. Estate of McKenna, 168 Cal. 339, 143 Pac. 605.

9. Civ. Code, § 1409. See note in 1 Cal. Law Rev. 399 and in 2 Cal. Law Rev. 251. As to constitutionality of statutes precluding inheritance by one who killed decedent, see note in 6 A. L. R. 1408.

10. Estate of Agoure, 165 Cal. 427, 132 Pac. 587.

11. Estate of Kirby, 162 Cal. 91, Ann. Cas. 1913C, 928, 39 L. R. A. (N. S.) 1088, 121 Pac. 370, As to distinction between manslaughter and murder, see HOMICIDE.

12. Estate of Donnelly, 125 Cal. 417, 73 Am. St. Rep. 62, 58 Pac. 61. As to rights of person civilly dead, see PRISONS AND PRISONERS.

13. Code Civ. Proc., § 1963, subd. 28. See EVIDENCE.

14. Solomon v. Redona, 34 Cal. App. Dec. 1039, 198 Pac. 643.

that he leaves heirs nearer than the fifth degree.[15] However, if a decedent "leaves no husband, wife, or kindred, and there are no heirs to take his estate or any portion thereof under subdivision 8 of this section, the same escheats to the state for the support of the common schools."[16] The state does not take by succession under this subdivision,[17] as escheat is not succession but its opposite, since it is what happens when there is no succession.[18] And a final order that the money belonging to an estate be paid into the state treasury, as directed by statute when there are no heirs, does not vest title to such fund. An action of escheat is necessary for that purpose.[19]

IV. VESTING AND ACQUISITION OF INHERITANCE.

§ 19. When Title Vests.—It is a settled rule that no inheritance can vest, nor can any person be the actual or complete heir of another till the death of the latter.[20]

Under Mexican law, on the death of an intestate, the heirs succeeded immediately to the estate, and became personally responsible for the debts of the deceased,[1] even

15. In re Herrichs' Estate (Ahrens v. Aston), 180 Cal. 175, 179 Pac. 883.

16. Civ. Code, § 1386, subd. 9. See Const., art. IX, § 4, providing that the proceeds of all estates of deceased persons who may have died without leaving a will or heirs shall be appropriated to the school fund. And see Fickes v. Baker, 36 Cal. App. 129, 171 Pac. 819, holding that under this provision the state has such an interest in the property of one dying intestate without heirs, as will render its consent necessary to the reformation of a voluntary conveyance made by decedent in his lifetime, to include additional property.

17. Estate of Miner, 143 Cal. 194, 76 Pac. 968.

18. Per Beatty, C. J., dissenting in Estate of Miner, 143 Cal. 194, 76 Pac. 968.

19. Estate of Miner, 143 Cal. 194, 76 Pac. 968. See ESCHEAT.

20. Estate of Loyd, 170 Cal. 85, 148 Pac. 522; Estate of Warner, 6 Cal. App. 361, 92 Pac. 191 (quoting Blackstone's Commentaries). See infra, § 25.

1. McNeil v. First Congregational Society, 66 Cal. 105, 4 Pac. 1096; Coppinger v. Rice, 33 Cal. 408; De La Guerra v. Packard, 17 Cal. 182.

though they were minors.[2] No administration, in the common-law sense, was needed, or could be had,[3] all disbursements in payment of the decedent's debts being made in behalf of the heirs, and in discharge of their personal liability.[4] These rules have undoubtedly profoundly influenced the law of California. Under the system here, the property of an intestate, both real and personal, passes immediately upon his death to his heirs by the single operation of the law of inheritance,[5] subject to

2. Coppinger v. Rice, 53 Cal. 408.

3. McNeil v. First Congregational Society, 66 Cal. 105, 4 Pac. 1096; Coppinger v. Rice, 33 Cal. 408.

4. De La Guerra v. Packard, 17 Cal. 182.

5. Civ. Code, § 1384; Klokke Inv. Co. v. Lissner, 186 Cal. 731, 200 Pac. 590; Estate of Ross, 180 Cal. 643, 182 Pac. 755; Estate of Hills, 176 Cal. 232, 168 Pac. 20; Estate of Yorba, 176 Cal. 166, 167 Pac. 854; People's Water Co. v. Anderson, 170 Cal. 683, 151 Pac. 127; Phelps v. Grady, 168 Cal. 73, 141 Pac. 926; Western Pac. Ry. Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284; Raulet v. Northwestern etc. Ins. Co., 157 Cal. 213, 107 Pac. 292; Estate of Patterson, 155 Cal. 626, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654, 102 Pac. 941 (holding that the estate of the ancestor vests in the heirs at law immediately on the former's death, though the heirs take only because of the fact that the ancestor's will is not susceptible of probate); Estate of Bump, 152 Cal. 274, 92 Pac. 643; Estate of Campbell, 149 Cal. 712, 87 Pac. 573; Trippet v. State, 149 Cal. 521, 8 L. R. A. (N. S.) 1210, 86 Pac. 1084; State v. Miller, 149 Cal. 208, 85 Pac. 609; Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459; Berry v. Eyraud, 134 Cal. 82, 66 Pac. 74; Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78, 61 Pac. 659; Estate of Crook, 125 Cal. 459, 58 Pac. 89; Estate of Packer, 125 Cal. 396, 73 Am. St. Rep. 58, 58 Pac. 59; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091; Smith v. Olmstead, 88 Cal. 582, 22 Am. St. Rep. 336, 12 L. R. A. 46, 26 Pac. 521; Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081; Phelan v. Dunne, 72 Cal. 229, 13 Pac. 662; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; Estate of Moore, 57 Cal. 437; Pearson v. Pearson, 46 Cal. 609; Chapman v. Hollister, 42 Cal. 462; Brenham v. Story, 39 Cal. 179; Estate of Woodworth, 31 Cal. 595 (saying that the personal representative no more owns the personalty than he does the realty); Farrell v. Enright, 12 Cal. 450; Gray v. Palmer, 9 Cal. 616; Miller v. Oliver, 36 Cal. App. Dec. 379, 202 Pac. 168; Smith v. Barrick, 41 Cal. App. 28, 182 Pac. 56; Estate of Barrett, 6 Cof. Prob. Dec. 398; Estate of Reddy, 5 Cof. Prob. Dec. 405; Estate of Barrett, 5 Cof. Prob. Dec. 376; Thorpe v. Sampson, 84 Fed. 63; Lloyd v. Ball, 77 Fed. 365.

the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration.[6] The common-law rule that the title to the personal property of a decedent vested in his personal representative and that of the real estate vested in the heir[7] never prevailed in this state,[8] although for a brief period, from January 1, 1873, the date the codes became effective, till July 1, 1874, it was the rule that all property of an intestate passed in the first instance to the personal representative.[9] Save for this brief period, as already stated, the title passes to the heirs immediately upon the death of an intestate. While it is true that the heirs may be unknown,[10] and unascertained until decree of distribution,[11] and while the decree, when it has become final, constitutes a muniment of title which will prevail over contrary provisions of the will or of the statutes of descent,[12] the decree of distribution and the settlement of the estate serve only to release the property from the conditions to which, as the property of a deceased person, it was subject.[13] In other words, the title of the heirs does not originate in the decree, but comes to them from the ancestor.[14]

6. See infra, § 21.

7. See the following cases referring to the common law: Estate of Woodworth, 31 Cal. 595; Jahns v. Nolting, 29 Cal. 507; Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Richards v. Blaisdell, 12 Cal. App. 101, 106 Pac. 732.

8. Raulet v. Northwestern etc. Ins. Co., 157 Cal. 213, 107 Pac. 292; Estate of Woodworth, 31 Cal. 595; Jahns v. Nolting, 29 Cal. 507; Gray v. Palmer, 9 Cal. 616; Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Taylor v. Sanson, 24 Cal. App. 515, 141 Pac. 1060; Richards v. Blaisdell, 12 Cal. App. 101.

9. Lloyd v. Ball, 77 Fed. 365. See Bates v. Howard, 105 Cal. 173, 38 Pac. 715, holding that section 1384 of the Civil Code, providing that the property of an intestate passes to his heirs, subject to administration, which was adopted in 1874, was but declaratory of the existing law.

10. State v. Miller, 149 Cal. 208, 85 Pac. 609.

11. Estate of Lux, 134 Cal. 3, 66 Pac. 30.

12. Estate of Yorba, 176 Cal. 166, 167 Pac. 854.

13. Bates v. Howard, 105 Cal. 173, 38 Pac. 715. As to effect of decrees of distribution in general, see EXECUTORS AND ADMINISTRATORS.

14. Estate of Yorba, 176 Cal. 166, 167 Pac. 854; Western Pac. Ry.

§ 20. Title Acquired.—The title which passes to heirs is that which the deceased had in and to the property at the time of his death, or which has inured to the estate after death and before distribution.[15] The heirs occupy the place of the ancestor and cannot claim any other or greater right in the property than he would have had. And any disposition of property made by him in his lifetime, if binding on him, is equally binding on them.[16] The title taken is also subject to the liens of administration, which cover the payment of debts and funeral expenses, the family allowance, and the expenses of administration.[17] And the heirs finally come into possession and enjoyment of such portion of the estate only as may remain after the execution of his trusts by the administrator.[18] There can be no question as to the power of the legislature to impose these liabilities upon the estate,

Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284 (saying that the decree of distribution does not create title but merely declares it); Bates v. Howard, 105 Cal. 173, 38 Pac. 715.

15. Bath v. Valdez, 70 Cal. 350, 11 Pac. 724.

16. Peck v. Brummagim, 31 Cal. 440, 81 Am. Dec. 195.

17. Klokke Inv. Co. v. Lissner, 186 Cal. 731, 200 Pac. 590; In re Benvenuto's Estate, 183 Cal. 382, 191 Pac. 678; People's Water Co. v. Anderson, 170 Cal. 683, 151 Pac. 127; Western Pac. Ry. Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284; Estate of Vance, 152 Cal. 760, 93 Pac. 101; Estate of Bump, 152 Cal. 274, 92 Pac. 643; Trippet v. State, 149 Cal. 521, 8 L. R. A. (N. S.) 1210, 86 Pac. 1084; Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78, 61 Pac. 659; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Smith v. Olmstead, 88 Cal. 582, 22 Am. St. Rep. 336, 12 L. R. A. 46, 26 Pac. 521; Phelan v. Dunne, 72 Cal. 229, 13 Pac. 662; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; Estate of Moore, 57 Cal. 437; Pearson v. Pearson, 46 Cal. 609; Chapman v. Hollister, 42 Cal. 462; Brenham v. Story, 39 Cal. 179; Estate of Woodworth, 31 Cal. 595; Gray v. Palmer, 9 Cal. 616; Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Thorpe v. Sampson, 84 Fed. 63; Lloyd v. Ball, 77 Fed. 365.

18. Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086. And see Estate of Vance, 152 Cal. 760, 93 Pac. 1010 (holding that when the decedent bound himself to pay a debt in money or to transfer certain stock, his property passed to the heirs subject to the obligation and to the exercise of the option by his personal representative. Whatever title the heirs took was subject to the exercise of this option).

subject to which the property vests in the heir, the right to inherit being itself statutory.[19] Yet when once the descent is cast, the title of the heir becomes clothed with the sanctity of a vested property interest, which the legislature is as powerless to limit or burden as it is any other right of private property.[20] For example, though an heir takes an estate on the death of his ancestor subject to such powers of sale as then inhere in the court, for such purposes as are then specified, the legislature cannot by subsequent legislation enlarge these powers or purposes.[1] Such legislation will be valid as to subsequent successions, however.[2] And the legislature may, even as to previous successions, enact valid laws prescribing different procedure in making and confirming sales.[3]

§ 21. Possession and Control.—At common law the heir alone had the right of possession of and control over the realty, but this rule never obtained in California.[4] The rule in this state is that the personal representative of an intestate is entitled, and it is his duty, to take and hold possession of both the real and personal property belonging to the estate, for purposes of administration, until

19. Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78, 61 Pac. 659; Brenham v. Story, 39 Cal. 179.

An heir must take his estate on such conditions and subject to such burdens as the state may have imposed: Estate of Bump, 152 Cal. 274, 92 Pac. 643; Estate of Stanford, 126 Cal. 112, 45 L. R. A. 788, 54 Pac. 259. And see McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681 (holding that the legislature may enact that in suits to enforce liens against the estate only the administrator need be made a party, as it has done in Code Civ. Proc., § 1582); affirmed in 224 U. S. 558, 56 L. Ed. 883, 32 Sup. Ct. Rep. 602, see, also, Rose's U. S. notes.

20. Estate of Patterson, 155 Cal. 626, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654, 102 Pac. 941; Estate of Stanford, 126 Cal. 112, 45 L. R. A. 788, 54 Pac. 259; Estate of Packer, 125 Cal. 396, 73 Am. St. Rep. 58, 58 Pac. 59. See CONSTITUTIONAL LAW, vol. 5, p. 882.

1. In re Benvenuto's Estate, 183 Cal. 382, 191 Pac. 678; Estate of Newlove, 142 Cal. 377, 75 Pac. 1083.

2. Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78, 61 Pac. 659.

3. In re Benvenuto's Estate, 183 Cal. 382, 191 Pac. 678. See EXECUTORS AND ADMINISTRATORS.

4. Mecks v. Hahn, 20 Cal. 620; Harwood v. Marye, 8 Cal. 580.

the estate is settled, or until the court orders it delivered to the heirs.[5] The administrator is also entitled to receive the rents and profits of the real estate.[6] It follows from this that an heir has no right to recover possession of the realty of his ancestor as against the latter's personal representative,[7] until after decree of distribution,[8] even when he claims the latter is unduly delaying to close the administration.[9] Nor can he, by any act of his own, such as a sale of his interest, affect the administrator's right of control over the property.[10] The code specifically provides that the administrator cannot recover possession of real estate from the heir,[11] and that possession should be ordered delivered to the heirs,[12] after the time for presenting claims, unless the land is necessary for purposes of administration. But this is merely through the indulgence of the law. And if a sale in course of administration becomes necessary, the property may be retaken from the heir and sold to the extinguishment of his title.[13]

5. Code Civ. Proc., §§ 1452, 1581; People's Water Co. v. Anderson, 170 Cal. 683, 151 Pac. 127; Western Pac. Ry. Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284; Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78, 61 Pac. 659; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; Harper v. Strutz, 53 Cal. 655; Meeks v. Kirby, 47 Cal. 168; Chapman v. Hollister, 42 Cal. 462; Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 290; Estate of Woodworth, 31 Cal. 595; Jahns v. Nolting, 29 Cal. 507; Burton v. Lies, 21 Cal. 87; Meeks v. Hohn, 20 Cal. 620; Curtis v. Sutter, 15 Cal. 259; Harwood v. Marye, 8 Cal. 580; Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237. See Soto v. Kroder, 19 Cal. 87, holding the statute does not apply to cases which arose before its passage. See EXECUTORS AND ADMINISTRATORS. Possession of administrator as adverse to heirs, see ADVERSE POSSESSION, vol. 1, p. 519.

6. Code Civ. Proc., § 1452. Estate of Woodworth, 31 Cal. 595.

7. Plass v. Plass, 121 Cal. 131, 53 Pac. 448; Thorpe v. Sampson, 84 Fed. 63 (holding this to be the rule under the express provisions of section 1452 of the Code of Civil Procedure) as to action by heir against third persons, see infra, § 29.

8. Wheeler v. Bolton, 54 Cal. 302.

9. Berry v. Eyraud, 134 Cal. 82, 66 Pac. 74. In case of delay the remedy of the heirs is to force a settlement and distribution.

10. Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086.

11. Code Civ. Proc., § 1452.

12. Code Civ. Proc., § 1453.

13. Blair v. Hazzard, 158 Cal. 721, 112 Pac. 298. See EXECUTORS AND ADMINISTRATORS.

Where there is no administration the heirs are entitled to possession of the estate.[14]

§ 22. Relation of Heirs to Each Other.—The heirs of a decedent take his realty as tenants in common.[15] Where coheirs succeed to an equitable title of the ancestor, they occupy a position of mutual obligation toward each other, and one cannot acquire the outstanding legal title to the prejudice of the other but will hold it in trust, proportionately, for him.[16] Heirs may, if they choose, take the estate undivided, and either hold their interests in common, or divide the property by agreement among themselves, or they may have it divided in the manner provided for in section 1675 of the Code of Civil Procedure, but this is not compulsory.[17] Where heirs have assumed to divide the estate among themselves, and their division has been acquiesced in and acted upon for many years by all parties in interest, they and their successors are estopped to question the validity of the disposition thus made.[18] An agreement between heirs for the distribution to one of a sum in excess of his share, made by way of compromise of existing controversies, is valid and enforceable.[19] Where, on the death of a husband, leaving a widow and minor children surviving, the widow takes possession of his separate personal property and deals with it without administration, she holds it as a trustee for the benefit of the children and herself. And her pos-

14. Pearson v. Pearson, 46 Cal. 609; Chapman v. Hollister, 42 Cal. 462 (holding, however, that if letters of administration have been granted, and the courts have obtained jurisdiction of the estate, a temporary vacancy in the office of administrator, the administration being still unclosed, will not entitle the heir to possession).

15. Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428; Lataillade v. Orena, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924; In re Grider, 81 Cal. 571, 22 Pac. 908; Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641; Smith v. Barrick, 41 Cal. App. 28, 182 Pac. 56.

16. Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641.

17. Moore v. Lauff, 30 Cal. App. 452, 158 Pac. 557.

18. Estate of Yorba, 176 Cal. 166, 167 Pac. 854.

19. Estate of Broome, 162 Cal. 258, 122 Pac. 470.

session is also that of the children so as to prevent the running of the statute of limitations against their action. This is true even though the property is invested in real estate and title is taken in the name of one who had knowledge at the time that it was a trust fund.[20]

§ 23. Claiming Inheritance—Fraudulent Claims.—While the law requires a nonresident alien who takes by succession to appear and claim the property within five years from the time of the succession,[1] there is no time limited within which heirs, who are citizens of the United States, must claim their inheritance.[2] They are not barred ipso facto by any statutory forfeiture, as for delay in claiming the estate. They can be barred only by a judgment in a proceeding by information for an escheat, and then only after a lapse of five years from the judgment.[3] If no action for escheat is brought, they may enforce their claim, notwithstanding a lapse of more than five years after deposit of the property with the state treasurer.[4]

Fraudulent claims.—By section 156 of the Civil Code it is made a felony fraudulently to produce an infant falsely pretending it to have been born of a parent whose child would be entitled to inherit an estate.[5]

V. OBLIGATIONS, RELEASES AND CONVEYANCES OF HEIRS.

§ 24. In General.—The Civil Code provides that those who succeed to the property of a decedent are liable for

20. McClure v. Colyear, 80 Cal. 378, 22 Pac. 175.

1. See ALIENAGE AND CITIZENSHIP, vol. 1, pp. 921–927.

2. Estate of Miner, 143 Cal. 194, 76 Pac. 968. See Pyatt v. Brockman, 6 Cal. 418 holding that the distributive share of a nonresident heir does not pass to his coheirs, though so ordered by the court, on his failure for one year to claim it, but remains his until he dies or disposes of it, and should be paid into the state treasury to await claim by him or his representatives.

3. State v. Miller, 149 Cal. 208, 85 Pac. 609; Code Civ. Proc., § 1272. As to the subject of escheats in general, see ESCHEAT.

4. Estate of Miner, 143 Cal. 194, 76 Pac. 968.

5. Pen. Code, § 156.

his obligations in the cases and to the extent prescribed by the Code of Civil Procedure.[6] For instance, the code requires all claims arising on contract against a decedent to be presented to the personal representative,[7] and specifically authorizes the bringing of certain actions against him.[8] And the result is that actions directly against the heir for the debts or obligations of the ancestor are almost unknown to California law.

Liability upon covenants.—It was the rule at common law that an heir was not bound by the covenant of his ancestor, unless he was expressly named therein.[9] The rule as declared in the Civil Code is as follows:

"Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law."[10]

Under this provision, inasmuch as heirs are answerable upon covenants only "in the cases and in the manner prescribed by law," they are not liable for a claim arising from a breach of a covenant occurring in the lifetime of the ancestor, unless it has been regularly presented in the course of administration as a claim against the estate.[11]

Heir's own debts.—The court in which administration is had has no power to appropriate the distributive share of an heir to the payment of his debts owing to third persons, even though the debt is in judgment, and the

6. Civ. Code, § 1408.

7. Code Civ. Proc., § 1493. See EXECUTORS AND ADMINISTRATORS.

8. Code Civ. Proc., § 1582 (actions for recovery of real or personal property), § 1584 (actions for certain torts of deceased relating to property), § 1597 (action to enforce contracts to transfer real or personal property). See EXECUTORS AND ADMINISTRATORS.

9. Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451; McDonald v. McElroy, 60 Cal. 484. See COVENANTS, vol. 7, p, 737.

10. Civ. Code, § 1115.

11. McDonald v. McElroy, 60 Cal. 484.

heir is a convict.[12] Since, however, the interest of an heir vests immediately on the death of his ancestor, a judgment thereafter docketed becomes a lien upon his interest in the realty, though distribution has not been had. And this lien cannot be avoided by a subsequent assignment by the heir of his interest in the estate.[13]

§ 25. Assignment and Release of Expectancy.—As already seen, no one can be heir to a living person.[14] The expectancy of an heir apparent is a mere possibility which could not be transferred at common law, though under the doctrine of equity, such a transfer will be enforced under some circumstances after the death of the ancestor.[15] So, also, it is settled that notwithstanding sections 700 and 1045 of the Civil Code, an heir prospective may enter into a contract with his ancestor for the release of his expectancy.[16] Unlike the case where an assignment of an expectancy to a third person is made, a court sitting in equity deos not require a showing of fairness in case of a release of expectancy to an ancestor.[17] A release of an expectancy may be set aside for mistake of fact, as well as for fraud.[18]

§ 26. Conveyance by Heir.—Inasmuch as real property passes to the heirs immediately upon the death of the ancestor,[19] they may enter into contracts about or convey

12. Matter of Estate of Nerac, 35 Cal. 392, 95 Am. Dec. 111. As to right of retainer in respect of indebtedness of heir, see note in 1 A. L. R. 991.

13. Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459. As to liens of judgment, see JUDGMENT.

14. See supra, § 19.

15. See ASSIGNMENTS, vol. 3, p. 250, and note in 17 A. L. R., at page 597.

16. In re Garcelon's Estate, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414. See Racouillat v. Sansevain, 32 Cal. 376, holding a relinquishment to be a sufficient consideration for a contract, although the claim of the heir was of doubtful validity. As to release of inheritance as between husband and wife, see DIVORCE AND SEPARATION; HUSBAND AND WIFE.

17. Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962.

18. Miller v. Brode, 186 Cal. 409, 199 Pac. 531.

19. See supra, § 19.

the title cast upon them,[20] even though administration is not completed and the estate remains undistributed.[1] The rule in this respect is the same whether the heirs be foreign or domestic, though the title conveyed by a nonresident heir is subject to the right of local administration.[2] Under these rules a widow may convey the interest she takes as heir in the community property;[3] and a husband, as heir to a one-third share in the separate property of his wife, has an interest which he may sell at any time, subject to the claims of administration. This applies to an interest in a policy of insurance on his own life in favor of the wife, which he takes as her heir, on her death before him.[4] The title of the heir may not only be conveyed, but may also be lost by adverse possession, the party claiming by adverse possession taking subject to administration, just as a grantee would.[5]

§ 27. **Title Conveyed—Rights of Purchaser.**—Since the title of an heir is subject to the liens of administration,[6] it follows that the title he conveys will be subject to the same liens.[7] But if the property is not needed for the

20. Phelps v. Grady, 168 Cal. 73, 141 Pac. 926; Estate of Packer, 125 Cal. 396, 73 Am. St. Rep. 58, 58 Pac. 59; Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086; Smith v. Olmstead, 88 Cal. 582, 22 Am. St. Rep. 336, 12 L. R. A. 46, 26 Pac. 521; Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081; Brenham v. Story, 39 Cal. 179; Smith v. Barrick, 41 Cal. App. 28, 182 Pac. 56; Estate of Conroy, 6 Cal. App. 741, 93 Pac. 205 (holding that where before his death an heir conveys his interest in the ancestor's estate, his heirs are bound thereby and inherit nothing of the estate from him); In re Estate of Fay, 5 Cal. App. 188, 89 Pac. 1065; Estate of Reddy, 5 Cof. Prob. Dec. 405; Pickens v. Merriam, 274 Fed. 1.

1. Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738. And see cases in last preceding note.

2. Phelps v. Grady, 168 Cal. 73, 141 Pac. 926.

3. In re Estate of Fay, 5 Cal. App. 188, 89 Pac. 1065.

4. In re Dobbel's Estate, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87.

5. See ADVERSE POSSESSION, vol. 1, p. 521.

6. See supra, § 20.

7. Phelps v. Grady, 168 Cal. 73, 141 Pac. 926; Curtis v. Schell, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951; In re Dobbel's Estate, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87; Smith v. Olmstead, 88 Cal. 582, 22 Am. St. Rep. 336, 12 L. R. A. 46, 26 Pac. 521; Estate of

purposes of administration the grantee upon petition therefor is entitled to have the property distributed to him.[8] However, the effect of the conveyance is not annulled by a subsequent decree of distribution distributing the property to the heir himself.[9] The rule is otherwise, however, if the property is distributed to others, both the heir and his grantee being bound by the decree of distribution.[10] And if a purchaser from an heir has notice of proceedings for the distribution of the estate, but fails to assert his right therein, he is precluded by the decree of distribution from claiming the interest of the heir as against an attaching creditor.[11]

VI. ACTIONS.

§ 28. Relating to Personalty.—It is the general rule that, in the absence of special circumstances, an heir cannot maintain an action for the recovery of or affecting the personal estate of his decedent pending administration.[12] He cannot ordinarily bring an action to enforce payments or collect debts,[13] or to set aside a transfer of personal property by his ancestor,[14] or to obtain an accounting against a surviving partner of their ancestor.[15] If there

Moore, 57 Cal. 437; Smith v. Barrick, 41 Cal. App. 28, 182 Pac. 56; Estate of Reddy, 5 Cof. Prob. Dec. 405. See supra, § 20. And see EXECUTORS AND ADMINISTRATORS.

8. Code Civ. Proc., § 1678; Estate of Hayne, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277; Estate of Wickersham, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437; In re Vaughn's Estate, 92 Cal. 192, 28 Pac. 221. See EXECUTORS AND ADMINISTRATORS.

9. Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981; Estate of Crooks, 125 Cal. 459, 58 Pac. 89; Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081.

10. William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323.

11. Freeman v. Rohm, 58 Cal. 111.

12. Holland v. McCarthy, 177 Cal. 507, 171 Pac. 421. As to right of administrator to sue, see EXECUTORS AND ADMINISTRATORS.

13. Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; Miller v. Ash, 156 Cal. 544, 105 Pac. 600; Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086; Grattan v. Wiggins, 23 Cal. 16.

14. Holland v. McCarthy, 177 Cal. 507, 171 Pac. 421.

15. Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086.

are any special circumstances which will take a case out of the general rule, it is the duty of the heir to allege them in his complaint, if he would bring the action.[16] Of course, after a decree of distribution, the title to evidences of debt which belonged to the intestate is in the heirs, and they may sue thereon.[17]

Proceedings to determine heirship are treated in another place.[18]

§ 29. **Relating to Realty.**—While the original rule in California was that an heir could not sue to recover possession of real property inherited by him, except when the estate was settled, or the property was delivered to him by order of court,[19] or except where he was entitled to possession, because there had been no administration,[20] the right of action is now conferred upon him by express statute. The statute is as follows:

"The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate,[1] or for the purpose of quieting title to the same, against anyone except the executor or administrator; but this section shall not be so construed as requiring them so to do."[2]

16. Holland v. McCarthy, 177 Cal. 507, 171 Pac. 421.

17. Stoner v. Security Trust Co., 32 Cal. App. Dec. 30, 190 Pac. 500.

18. See EXECUTORS AND ADMINISTRATORS.

19. Harper v. Strutz, 53 Cal. 655; Grattan v. Wiggins, 23 Cal. 16; Touchard v. Keyes, 21 Cal. 202; Burton v. Lies, 21 Cal. 87; Meeks v. Hahn, 20 Cal. 620. See Meeks v. Kirby, 47 Cal. 168, holding that an order made in the course of the administration of an estate, distributing certain real estate to an heir, did not relate back to the commencement of a previous action of ejectment by him for the property, so as to validate his suit.

20. Pearson v. Pearson, 46 Cal. 609; Updegraff v. Trask, 18 Cal. 458.

1. Phelan v. Smith, 100 Cal. 158, 34 Pac. 667, holding that the fact that the administration proceedings, including the decree of distribution, were void, does not affect the heir's rights in this respect. Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395. See EJECTMENT.

2. Code Civ. Proc., § 1452; Miller v. Oliver, 36 Cal. App. Dec. 379, 202 Pac. 168. See EXECUTORS AND ADMINISTRATORS, as to right of administrator to sue.

Under this section an heir may maintain an action against the grantee of the intestate to set aside conveyances obtained by fraud or undue influence,[3] or to have an absolute deed made by the ancestor declared to be a mortgage. And in the latter case, his status as heir may be litigated.[4] A direction in a will that undevised realty shall be converted into money does not prevent the heir suing to recover possession.[5] An heir at law can recover in an action of ejectment without an entry on the premises after the death of the ancestor, proof of his title as heir being sufficient.[6] In the absence of a special demurrer, an allegation that plaintiffs were the sons of a decedent and had been in possession of the real estate involved in suit since decedent's death, is a sufficient allegation of heirship.[7]

Action for trespass.—At common law the right of action for a trespass upon the realty committed after the death of an intestate, and while the heir was in possession, was in the heir. And the same rule would seem to obtain in California, notwithstanding the fact that the administrator is entitled to possession for the purposes of administration.[8] For trespasses committed during the lifetime of the decedent, the administrator is specifically authorized to sue.[9] Yet after distribution, an heir may be substituted as plaintiff in an action therefor brought by the personal representative.[10]

3. Page v. Garver, 146 Cal. 577, 80 Pac. 860 (a case in which there had been no administration). Trubody v. Trubody, 137 Cal. 172, 69 Pac. 968. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 788. As to statute of limitations as to bar to the action, see 2 A. L. R. 447, note; and see LIMITATION OF ACTIONS.

4. Collette v. Sarrasin, 184 Cal. 283, 193 Pac. 571.

5. Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091.

6. Soto v. Kroder, 19 Cal. 87. See EJECTMENT.

7. Castro's Exrs. v. Armesti, 14 Cal. 38.

8. Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395. See TRESPASS.

9. Code Civ. Proc., § 1583. See EXECUTORS AND ADMINISTRATORS.

10. Cortelyou v. Baker, 182 Cal. 168, 187 Pac. 417.

§ 30. **Parties.**—It was said in an early case that the administrator, being entitled to possession of the real estate, must be made a party to all suits affecting it.[11] This statement is, however, much too broad to be accurate at the present time. The personal representative is, indeed, usually a party to such suits,[12] but, as we have seen, the heirs may sue alone in almost all cases.[13] So the heir is the only necessary party to a suit to foreclose the lien of a street assessment, accruing after the death of the intestate, under a statute which requires that the suit be brought against the "owner" of the land.[14] On the other hand, the heirs are not necessary parties to actions involving the real estate of the ancestor, where the personal representative is a party. He represents them, and the judgment binds the heirs though they are not parties.[15] This rule is in keeping with section 1582 of the Code of Civil Procedure, which declares that actions for the recovery of property, real or personal, or for its possession, or to quiet title or determine any adverse claim, may be brought by or against personal representatives where such actions might have been maintained against the decedent.[16] And it is not repugnant to the fourteenth amendment to the federal constitution.[17]

11. Harwood v. Marye, 8 Cal. 580. See EXECUTORS AND ADMINISTRATORS.

12. See Code Civ. Proc., §§ 369, 385, 1582, 1583, 1584, 1589, etc.; and EXECUTORS AND ADMINISTRATORS.

13. See supra, § 29.

14. Phelan v. Dunne, 72 Cal. 229, 13 Pac. 662.

15. De La Ossa v. Oxarart, 58 Cal. 101 (ejectment); Cunningham v. Ashley, 45 Cal. 485 (ejectment). See JUDGMENT.

16. McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681 (mortgage foreclosure); Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704 (mortgage foreclosure); Finger v. McCaughey, 119 Cal. 59, 51 Pac. 13 (mortgage foreclosure); Collins v. Scott, 100 Cal. 446, 34 Pac. 1085 (mortgage foreclosure); Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738 (ejectment); Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700 (eminent domain proceedings); Bayley v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486 (mortgage foreclosure); Hearfield v. Bridges, 75 Fed. 47, 21 C. C. A. 212. See EXECUTORS AND ADMINISTRATORS.

17. McCaughey v. Lyall, 224 U. S. 558, 56 L. Ed. 883, 32 Sup. Ct. Rep. 602, see, also, Rose's U. S. Notes.

The heirs of a cestui que trust are the proper parties to bring suit to compel the conveyance of the legal title to themselves, though the estate is in process of administration, as the administrator, though entitled to the possession of the property, has no power to bring a suit to compel the conveyance of title to himself.[18] An action by certain heirs against the others for an accounting and division of property of a decedent on whose estate there had been no administration but whose widow had managed the property till her death, would seem to be maintainable only on the theory that all the heirs were tenants in common, and hence all of them, including the representatives of the widow, would be necessary parties.[19]

18. Janes v. Throckmorton, 57 Cal. 368.

19. Valencia v. Bernal, 26 Cal. 328.

DESERTION.

See DIVORCE AND SEPARATION.

DETECTIVES.

See CRIMINAL LAW, vol. 7, p. 809; POLICE.

DETINUE.

1. In General.
2. Defendant's Possession.
3. Pleading—Judgment.

§ 1. **In General.**—Detinue is a common-law action for the recovery of personal property unlawfully detained or its value, and for damages for its detention.[1] It is similar to replevin, though the latter at common law lay only to recover personal property illegally taken.[2] But it is distinct from the common-law action of trover, which was for the recovery of damages for the wrongful conversion of personal property.[3] And it is also distinct from the statutory remedy of claim and delivery, the latter being merely an auxiliary remedy, by which a person suing for the recovery of personal property may claim the immediate delivery at the commencement of the action.[4]

Although in civil actions in California there is but one form of action, which has no name, yet inasmuch as the principles which determine the rights of the parties remain as at common law,[5] the rules governing the old common-law action of detinue may be applied to an action similar thereto in which the auxiliary remedy of claim and delivery is not invoked.[6] The courts have therefore applied the rules pertaining to detinue to a case where the

1. Richards v. Morey, 133 Cal. 437, 65 Pac. 886.
2. See 9 Ruling Case Law, 148.
3. Richards v. Morey, 133 Cal. 437, 65 Pac. 886.
4. Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414. See CLAIM AND DELIVERY, vol. 5, pp. 156, 157.
5. See ACTIONS, vol. 1, p. 309.
6. Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463, per McFarland, J. See generally, CLAIM AND DELIVERY, vol. 5, p. 153.

complaint in stating a cause of action based on a contract of bailment alleges that the original taking was lawful but the detention unlawful.[7] Moreover, courts employ the principles of law governing in actions of detinue and trover to distinguish between the remedy given by the code to recover possession or the value in case delivery cannot be had and the remedy to recover damages for the wrongful conversion of personal property. It has been said that the distinction between them is as broad as that between the common-law actions of detinue and trover.[8]

§ 2. Defendant's Possession.—It has been said that in general in an action for the possession of personal property relief cannot be had from a defendant unless he is possessed of the property at the time of the commencement of the action, which fact must, therefore, constitute an essential element in plaintiff's cause of action.[9-10] However, this rule does not apply in an action founded on a contract of bailment, where the bailee has wrongfully parted with possession before demand or before the commencement of the action. Though possession by the defendant must be proved, yet it is not necessary that it shall be continued up to the time of the commencement of the suit and the plaintiff will be entitled to recover unless the defendant has been lawfully dispossessed. The principles are founded on the maxim that no one can take advantage

7. New Liverpool Salt etc. Co. v. Western Salt Co., 151 Cal. 479, 91 Pac. 152; Faulkner v. First National Bank, 130 Cal. 258, 62 Pac. 463. See McLaughlin v. Piatti, 27 Cal. 451, where a plaintiff had purchased five hundred head of cattle, part of a herd of several thousand, and where it was said that replevin would lie against the owner of the herd for the purpose of enabling the vendee to select his five hundred and that the action of claim and delivery is at least commensurate with the action of detinue at common law. See, also, Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684, quoting principle with approval.

8. Richards v. Morey, 133 Cal. 437, 65 Pac. 886; Kelly v. McKibben, 54 Cal. 192. See supra, this section.

9-10. Richards v. Morey, 133 Cal. 437, 65 Pac. 886; Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414; Hawkins v. Roberts, 45 Cal. 38. See CLAIM AND DELIVERY, vol. 5, p. 164 et seq.

of his own wrong, and they are as applicable now to an action based on a contract of bailment as they were to such an action when it had to be brought under the special form of detinue.[11] The burden is, therefore, on the one against whom the action is brought to show any excuse such as that his possession ceased before suit brought by accident or some means beyond his control and without his fault.[12]

§ 3. Pleading—Judgment.—Where the averments of fact in a complaint show the case to be one for which detinue would have been a proper action at common law, the general principles of pleading and practice apply to it which apply to that action.[13] Thus the courts, guided by the principles of pleading controlling in actions of detinue at common law, have held a complaint to be sufficient which alleged deposit of plaintiff's property with defendant and a demand for delivery of the same and refusal on the part of the defendant to comply with such demand, and that defendant "still unlawfully withholds and detains the same and each of them to the damage of

11. New Liverpool etc. Co. v. Western etc. Co., 151 Cal. 479, 91 Pac. 152 (holding that the fact that the bailee before demand or before the action was begun, had parted with the possession of the property is no defense to such action and the fact that plaintiff in such action was the vendee of the original bailor did not affect the case; Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463, per McFarland, J. (holding that an assignment of a note by the owner after the bailee had parted with its possession to a stranger transferred the title and right of possession to the owner's assignee, and that the bailee could not defend an action by the assignee for its possession or value on the ground that before the demand by the assignee he had delivered it to a third person who claimed to be the owner, and that he was therefore unable to deliver possession in compliance with the demand); Teter v. Thompson, 37 Cal. App. Dec. 857, 207 Pac. 260 (property acquired under conditional contract of sale).

12. New Liverpool etc. Co. v. Western etc. Co., 151 Cal. 479, 91 Pac. 152; Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

13. New Liverpool etc. Co. v. Western etc. Co., 151 Cal. 479, 91 Pac. 152; Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463. See supra, § 1. See CLAIM AND DELIVERY, vol. 5, p. 185 et seq.

plaintiff'' in a certain sum, the prayer being for the recovery of the possession of the property or for its value.[14] In an action of detinue it is usual to aver a bailment or finding, but the manner in which the defendant became possessed of the property has always been held to a mere matter of inducement.[15] It is no defense to the action to plead that the defendant before the commencement of the action has wrongfully disposed of the property and therefore is not in possession of it.[16]

Judgment.—The usual judgment in action in the nature of an action of detinue is in the alternative—that the plaintiff recover possession of the property or its value in case delivery cannot be had. But where it appears that the property cannot be delivered the defendant is in no way prejudiced by a judgment for the value only.[17]

14. Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

15. Otero v. Bullard, Figg & Co., 3 Cal. 188.

16. Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463. See supra, § 2.

17. Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463, per McFarland, J. See CLAIM AND DELIVERY, vol. 5, p. 199 et seq.; APPEAL AND ERROR, vol. 2, p. 1035.

DETRIMENT.

See DAMAGES, vol. 8, p. 725.

DEVASTAVIT.

See EXECUTORS AND ADMINISTRATORS.

DEVISE.

See WILLS.

DICTA.

See COURTS, vol. 7, p. 639.

DIPLOMATIC AND CONSULAR OFFICERS.

I. In General.
II. Jurisdiction and Power to Administer Estates.

I. In General.

1. Statutory Provisions.
2. Consular Courts.
3. Jurisdiction of Actions Against Consuls.

II. Jurisdiction and Power to Administer Estates.

4. Under Treaties Generally.
5. Right to Intervene and to Letters.

I. In General.

§ 1. **Statutory Provisions.**—Since the subject of the regulation of the rights and duties of diplomatic and consular officers and the granting of privileges to them is a matter which rests largely with national rather than with state governments, there are few statutes in California pertaining to such officers, and the decisions of the local courts of last resort are necessarily confined to questions of their powers, privileges and exemptions so far only as they interfere with, infringe upon, abridge or touch upon state rights and the administration of state government and laws. Chief among these questions which have been

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Cases are cited in this article to and including 187 Cal., 45 Cal. App. and 207 Pac.

considered are, jurisdiction over actions against consuls and other diplomatic officers[1] and the extent of a consul's right to administer estates in California.[2]

The statutory law of California declares that acknowledgments may be taken without the United States before certain diplomatic representatives of this country,[3] and also provides that the signature of the chief judge or presiding magistrate on judicial records of foreign countries must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul or consular agent of the United States in such foreign country.[4] It is clear that under the constitution, a person's absence from California on diplomatic or similar business does not affect the question of his residence.[5] Before the repeal of the immigration laws of California it was provided by the code that consuls, ministers, agents or other public functionaries of any foreign government, arriving in California in their official capacity were exempt from the provisions of those laws.[6]

§ 2. **Consular Courts.**—The law of nations, the provisions of treaties and the statutes enacted thereunder necessarily govern the rights, powers, duties and jurisdiction of consuls and diplomatic agents. It has been the uniform practice of civilized governments to provide consular tribunals in other than Christian countries for the trial of their subjects for offenses committed therein, and for the settlement of civil disputes between them, this being among the most important subjects of treaty stipulation.[7] Thus under the treaty of 1844 between the United States and China and an act of congress carrying it into effect, the United States commissioner and consuls

1. See infra, § 3.

2. See infra, §§ 4, 5.

3. Civ. Code, § 1183. See ACKNOWLEDGMENTS, vol. 1, pp. 233, 234, 236, 239, 240.

4. Code Civ. Proc., § 1906. See JUDGMENTS.

5. Const., art. XX, § 12.

6. Pol. Code, § 2963; repealed, Stats. 1921, p. 358.

7. See 9 Ruling Case Law, p. 157.

formerly constituted a judiciary for the government of the citizens of the United States in China and it was stipulated that they were governed by the law of nations, the laws of the United States, the common law, and the "decrees and regulations of the commissioner."[8] In 1906, however, congress created a United States court in China, which was given exclusive jurisdiction subject to certain qualifications in all cases and judicial proceedings whereof jurisdiction might formerly have been exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China.[9]

§ 3. Jurisdiction of Actions Against Consuls.—The immunity of ambassadors and public ministers from suits in the courts of the country to which they are sent is not extended by any principle of international law to consuls. Their liability to suit within the United States is dependent upon the constitution of the United States and the legislation of congress thereunder.[10] The constitution of the United States declares that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers and consuls and in such cases the supreme court shall have original jurisdiction.[11] But this provision does not make the jurisdiction of the supreme court necessarily exclusive. It is for congress to

8. Forbes v. Scannell, 13 Cal. 242 (holding that the decision of the consul as to the validity of an assignment is not conclusive in the courts of California); Dollar v. International Banking Corp., 13 Cal. App. 331, 109 Pac. 499 (holding that where the indorsement of a note by the payee to plaintiff's assignor was in consideration of the payment of an indebtedness of the payee to the assignor, the judgment of a consular court establishing the debt established nothing more than that the corporation payee was indebted to the first assignor in the sum named in the judgment upon payment of which the corporation payee made the indorsement).

9. See Fed. Stats. Ann., vol. 5, p. 1100; Swayne & Hoyt v. Everett, 255 Fed. 71, 166 C. C. A. 399.

10. Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 45 L. R. A. 579, 45 Pac. 676, 50 Pac. 758, per Harrison, J.

11. U. S. Const., art. III, § 2; Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512.

determine the mode and time at which a consul may invoke this jurisdiction, and a consul is not deprived of any right given him by the constitution, if he is afforded a means by which to avail himself of this judicial power.[12]

While at one time United States courts had exclusive jurisdiction of all suits or proceedings against consuls,[13] the state courts have had concurrent jurisdiction of such actions or proceedings since 1875.[14] This co-ordinate jurisdiction of the state courts is subject to the right of a defendant consul to have the judgment of a state tribunal reviewed by the supreme court of the United States and the sufficiency of his defense determined by that tribunal, so that a consul can thereby fully enjoy the rights given him by the constitution. This right, however, may be waived by him, since he has the same right to rest content with the judgment of the state court, either by merely pleading his defense to the cause of action without invoking this provision of the constitution, or by suffering default, as he would have to invoke its jurisdiction as a plaintiff, and if so waived he cannot, after judgment has been rendered against him, claim the right to a review of

12. Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 45 L. R. A. 579, 45 Pac. 676, 50 Pac. 758.

13. U. S. Rev. Stats., § 711, subd. 8, as originally enacted; Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 45 L. R. A. 579, 45 Pac. 676, 50 Pac. 758; Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090 (holding that the immunity from suit in a state court does not exempt those officers from being bound by all legal processes and proceedings in state courts to fix the lien of a tax upon property. No more responsibility attaches to the person of the consul in such a proceeding than arises in an action to enforce the assessment or than is occasioned by his appearance before a county board for the equalization of his assessment for purposes of state and county taxation); Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512 (holding that under this statute a state court had no jurisdiction of an action at law brought against a consul of a foreign government and the consul could not waive the privilege given him).

14. U. S. Rev. Stats., § 711, as amended in 1875; Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 45 L. R. A. 579, 45 Pac. 676, 50 Pac. 758. See 4 Fed. Stats. Ann., 2d ed., 1058.

this judgment under a writ of error by the supreme court of the United States.[15]

II. Jurisdiction and Power to Administer Estates.

§ 4. Under Treaties Generally.—In this country the right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law.[16] And it has been the declared policy of the federal government not to interfere by treaty with the laws of the states in the matter of such administration.[17] The intent will therefore not be ascribed to the federal government, by means of its treaty-making power, materially to abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdiction. It is obvious that such intent is not lightly to be imputed to the federal government and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it or necessarily implies it.[18]

By treaty with many countries their consuls and consular agents are given the same privileges as those of the most favored nation. And it would seem that the consuls of any such nations may claim the privileges extended by this country to the consuls of any other nation in regard to the administration and control of estates.[19]

15. Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 45 L. R. A. 579, 45 Pac. 676, 50 Pac. 758, per Harrison, J.

16. Rocca v. Thompson, 223 U. S. 317, 56 L. Ed. 453, 32 Sup. Ct. Rep. 207, affirming Estate of Ghio, 157 Cal. 552, 137 Am. St. Rep. 145, 37 L. R. A. (N. S.) 549, 108 Pac. 516, stating that in California the right seems to be given to the public administrator.

17. Estate of Servas, 169 Cal. 240, Ann. Cas. 1916D, 233, 146 Pac. 651.

18. Estate of Servas, 169 Cal. 240, Ann. Cas. 1916D, 233, 146 Pac. 651; Estate of Ghio, 157 Cal. 552, 137 Am. St. Rep. 145, 37 L. R. A. (N. S.) 549, 108 Pac. 516, per Shaw, J.

19. Estate of Ghio, 157 Cal. 552, 137 Am. St. Rep. 145, 37 L. R. A. (N. S.) 549, 108 Pac. 516, where

§ 5. Right to Intervene and to Letters—*Intervention.*—Under a treaty giving to the consular officers, as to aliens dying intestate, the right to "intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs,"[20] it has been held that there is no purpose to take away from the states the right of local administration provided by their laws upon the estates of deceased citizens of a foreign country and to commit the same to the consuls of such foreign nation to the exclusion of those entitled to administer as provided by the local laws of the state within which such foreigner resides and leaves property at the time of decease. The word "intervene" refers to a proceeding in a judicial tribunal, and to the universally recognized right to temporarily possess the estate of citizens of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation presupposes an administraton or judicial liquidation instituted otherwise than by the consul who is authorized to intervene. And the object and purpose of the treaty is met by allowing the foreign consul to appear in court for citizens of his country interested as heirs or creditors, either officially or in their name to protect their interests and requiring that he be served with notices to them, when notice is required.[1]

Italian consul claimed privileges granted to consuls of Argentine as well as those granted to consuls of Italy. See Rocca v. Thompson, 223 U. S. 317, 56 L. Ed. 453, 32 Sup. Ct. Rep. 207, affirming Estate of Ghio, 157 Cal. 552, 137 Am. St. Rep. 145, 37 L. R. A. (N. S.) 549, 108 Pac. 516, but leaving undecided question whether consul of Italian government could invoke the aid of provisions of the Argentine treaty. See TREATIES.

20. See Argentine treaty of July 27, 1853, art. IX; Stats. at Large, p. 1009.

1. Estate of Ghio, 157 Cal. 552, 137 Am. St. Rep. 145, 37 L. R. A. (N. S.) 549, 108 Pac. 516 (stating that if the public administrator refuses or fails to apply it may be possible that the consul may peti-

Right to letters of administration.—Where a treaty provides that a consular officer shall "so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and moreover, have the right to be appointed as administrator of such estate,"[2] a consul has a right to letters of administration on the estates of his deceased nationals, but not any exclusive right to administration.[3] He is a person "legally competent" within the meaning of the statute, providing to whom letters of administration may be issued.[4] But his right to letters depends upon the absence of any application for letters by other persons having priority over him, including the public administrator.[5] This is the only right which it is the intention of the treaty provision to confer; as the phrase, "so far as the laws of each country will permit" refers to the local laws of the respective states, there being no federal law for the administration of estates or decedents.[6]

tion for and receive letters to himself as the official agent for the persons interested, but the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country when they are present and ready to discharge their duties); Rocca v. Thompson, 223 U. S. 317, 56 L. Ed. 453, 32 Sup. Ct. Rep. 207, affirming Estate of Ghio, 157 Cal. 552, 137 Am. St. Rep. 145, 37 L. R. A. (N. S.) 549, 108 Pac. 516 (stating that it is generally conceded that a consular officer may intervene by way of observing the proceedings and that he may be present on the making of the inventory, without such rights being specifically given; and stating also that the court cannot perceive an intention to give the original administration of an estate to the consul general to the exclusion of one authorized by local law to administer the estate).

2. Section 14 of the treaty of March 20, 1911, between United States and Sweden.

3. Estate of Servas, 169 Cal. 240, Ann. Cas. 1916D, 233, 146 Pac. 651.

4. In re Holmberg's Estate, 193 Fed. 260.

5. Estate of Servas, 169 Cal. 240, Ann. Cas. 1916D, 233, 146 Pac. 651, stating that in In re Holmberg's estate, supra, the proceeding was ex parte and involved no question whether the consul was entitled to an exclusive and paramount right to administration.

6. Estate of Servas, 169 Cal. 240, Ann. Cas. 1916D, 233, 146 Pac. 651, per Lorigan, J.

DIRECT LEGISLATION.

See STATUTES.

DIRECT PRIMARIES.

See ELECTIONS.

DIRECTING VERDICT.

See CRIMINAL LAW, vol. 8, p. 1; TRIAL.

DIRECTORS.

See CORPORATIONS, vol. 6, p. 550.

DISBARMENT.

See ATTORNEYS AT LAW, vol. 3, p. 719.

DISCOVERY.

1. Scope of Article.
2. Bill of Discovery.
3. Discovery and Inspection Under the Code.
4. Proceedings.

§ 1. Scope of Article.—The subject of discovery and inspection, as treated in this article, has reference to the inspection pending civil actions of books, documents or writings within the possession or control of the opposite party. It does not include a treatment of the taking of testimony in advance of the trial,[1] the production of documents at the trial,[2] the inspection of writings which have been introduced in evidence, or used to refresh the memory of a witness,[3] or the inspection by the jury of property which is the subject of litigation.[4] Neither does it treat the right of a stockholder or creditor of a corporation to inspect its books,[5] or the right of the attorney general to examine books and papers for the purpose of discovering property which has escheated to the state.[6] Inspection laws and the right to physical examination of a party are treated elsewhere.[6a]

§ 2. Bill of Discovery.—A bill of discovery in the old chancery courts was an auxiliary proceeding or one assistant to the courts of law, and arose from the inability in the courts of common law to compel a complete discovery by the oath of the parties in the suit.[7] The bill sought a

1. See DEPOSITIONS, ante, p. 394.
2. See EVIDENCE; WITNESSES.
3. See WITNESSES.
4. See TRIAL.
5. See CORPORATIONS, vol. 6, p. 841 et seq.
6. See ATTORNEY GENERAL, vol. 3, p. 573.
6a. See INSPECTION.
7. Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145; Easterly v. Bassignano, 20 Cal. 489.

disclosure of facts within the knowledge of the defendant, or of papers in his possession in aid of some other action or proceeding. The discovery might have been made in the same suit in which the ultimate relief was pursued, or it might have been sought merely in aid of some other proceeding pending or to be brought. But in either case, the matters as to which discovery was sought were required to be material to the existing suit or the one to be brought. In other words, it was necessary that the facts be relevant to the cause of action or that they assist in establishing it. This rule precluded a discovery of the whereabouts of defendant stockholders who were known and had been made parties.[8]

There is some doubt as to the right to maintain this proceeding in California. It has been suggested that since under modern legislation and present conditions full relief can now be obtained and granted in the court in which the action is to be tried, there is no longer any reason or necessity for a separate proceeding by a bill of discovery; and that although bills of discovery have not been expressly abolished by statute, they cannot well exist in this state.[9] This point has not been finally determined, however, and was adverted to again in a comparatively recent case, wherein it was stated that whatever may be the ultimate conclusion on this matter of procedure, there is no doubt that the superior court under the constitution has the power, by some sort of process, to compel a discovery in all cases in which, under the established rules of chancery practice existing at the time of the adoption of the constitution, a party would have been entitled to this relief.[10]

8. Union Collection Co. v. Superior Court, 149 Cal. 790, 87 Pac. 1053. See Norris v. Denton, 2 Cal. 378, holding that a bill of discovery filed after the termination of the action at law comes too late. As to discovery in patent litigation, see 4 Cal. Law Rev. 1.

9. Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145; Reed v. Union Copper Min. Co., 1 Cal. Unrep. 587.

10. Union Collection Co. v. Superior Court, 149 Cal. 790, 87 Pac. 1053.

§ 3. Discovery and Inspection Under the Code.—Section 1000 of the Code of Civil Procedure, based upon section 446 of the Practice Act, makes provision for a remedy in the nature of a bill of discovery.[11] This section reads as follows:

"Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness."[12]

This provision relates to the obtaining of an inspection and copy of a book or paper without any reference to its production in court, and as indicated in the last sentence is distinct from the right to compel the production of books or papers in court.[13] Under it a court has power to enforce an inspection of documents relating to the merits of a cause of action or defense, but not of documents which are merely collateral to the merits. If a defendant in an action upon a contract has forgotten the execution of the instrument or doubts the correctness of the copy in the complaint, he may demand and the court

11. Levy v. Superior Court, 105 Cal. 600, 613, 39 L. R. A. 811, 38 Pac. 965.

12. Avery v. Wiltsee, 177 Cal. 484, 171 Pac. 95. As to power of court to punish a disobedience of its order, see CONTEMPT, vol. 5, p. 911.

13. Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976; Ex parte Clarke, 126 Cal. 235, 77 Am. St Rep. 176, 46 L. R. A. 835, 58 Pac. 546. As to production of documents at the trial, see EVIDENCE; WITNESSES.

may enforce an inspection of the original.[14] But when an action for damages is brought against a corporation and its stockholders are designated by fictitious names, the stock-books of the corporation cannot be said to be material to the action, and a court is not authorized in ordering an inspection of such stock-books to enable the plaintiff to designate the defendants by their proper names. The plaintiff should secure such information before commencing his action, and if he is denied an inspection of the books he has a remedy by mandamus.[15]

§ 4. Proceedings.—Under the express provisions of the code section just quoted, an order for inspection of documents must be made upon notice.[16] If a court in violation of this section should make such an order upon an ex parte application, it may vacate such order as inadvertently made and dismiss any proceedings taken to enforce it.[17] The affidavit which is the basis of the order must show that the opposite party has possession or control of a book, paper or document containing evidence material to the issue before the court, and must so designate or describe the precise book, paper or document containing such evidence that it may be identified.[18] The last mentioned requisite is the more important of the two as the constitutional right of the people to be protected against the unlawful seizure of their private documents precludes a general or indiscriminate ransacking of one's private papers as a means of locating the desired evidence.[19] The mere fact that a party seeking the inspec-

14. Curtis v. Richards, 9 Cal. 33; Byrne v. Luning Co., 4 Cal. Unrep. 895, 38 Pac. 454.

15. Favorite v. Superior Court, 34 Cal. App. Dec. 1047, 198 Pac. 1004.

16. See supra, § 3.

17. Favorite v. Superior Court, 34 Cal. App. Dec. 1047, 198 Pac. 1004.

18. Funkenstein v. Superior Court, 23 Cal. App. 663, 139 Pac. 101; San Fernando Copper Min. & R. Co. v. Humphrey, 11 Fed. 772.

19. Ex parte Clarke, 126 Cal. 235, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546; Funkenstein v. Superior Court, 23 Cal. App. 663, 139 Pac. 101. See SEARCH AND SEIZURE.

tion is unable to specify the particular thing to which he desires access does not justify any departure from the strict requirement of the constitution.[20]

As indicated by the language of section 1000 of the Code of Civil Procedure, a disobedience of an order of inspection justifies a court in assuming the document to be as alleged by the party obtaining the order,[1] unless such disobedience is satisfactorily excused. The loss or destruction of the document in question constitutes a sufficient excuse for noncompliance, within the meaning of the rule.[2]

20. Funkenstein v. Superior Court, 23 Cal. App. 663, 139 Pac. 101.

1. Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979.

2. Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43.

DISCONTINUANCE.

See DISMISSAL, DISCONTINUANCE AND NONSUIT.

DISEASE.

See ANIMALS, vol. 2, p. 1; HEALTH; INSPECTION.

DISFRANCHISEMENT.

See DUELLING; ELECTIONS; PRISONS AND PRISONERS.

DISMISSAL, DISCONTINUANCE AND NONSUIT.

I. Introductory.
II. Voluntary.
III. Involuntary.

I. Introductory.

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2. Definitions and Distinctions.

II. Voluntary.

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5. Stage of Proceedings When Plaintiff may Dismiss.
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III. Involuntary.

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11. Nonappearance of Party.
12. Failure to Pay Costs on Change of Venue.
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14. Want of Cause of Action.

Cases are cited in this article to and including 187 Cal., 45 Cal. App. and 207 Pac.

15. Miscellaneous Grounds of Dismissal.
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22. Statutory Provision.
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C. UPON FAILURE OF PROOF.

32. In General.
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I. Introductory.

§ 1. Scope of Article.—This article contains a treatment of matters relating to dismissals, discontinuances, and nonsuits in civil actions, excluding, however, questions relating to the authority of an attorney to enter a dismissal,[1] the dismissal of an action as affecting a plea of the pendency of another action,[2] dismissal for failure to give security for costs,[3] the effect of a submission of a cause of action to arbitration as a discontinuance,[4] the validity of a judgment dismissing an action for want of prosecution entered after the death of plaintiff,[5] the effect of judgments of dismissal as a bar,[6] and questions relating to the review of orders granting or denying motions for a dismissal or nonsuit by motion for new trial,[7] or upon appeal.[8] Matters relating to the dismissal of particular actions or proceedings are treated under other more appropriate headings, such, for example, as dismissal of proceedings to procure a new trial,[9] or the dismissal of appeals,[10] dismissals in actions of ejectment,[11] in actions to recover broker's commissions,[12] in election contests,[13] in libel and

1. See Attorneys at Law, vol. 3, p. 664.

2. See Abatement and Revival, vol. 1, p. 26.

3. See Costs, vol. 7, p. 275.

4. See Arbitration and Award, vol. 3, p. 48.

5. See Abatement and Revival, vol. 1, p. 64, note 12.

6. See Judgments.

7. See New Trial.

8. See Appeal and Error, vol. 2, pp. 139, 158 (judgment of nonsuit as a final judgment); p. 276 (necessity of stating grounds of motion for nonsuit); p. 516 (notice of motion to dismiss as part of judgment-roll); p. 692 (necessity that record show grounds of motion); pp. 707, 708, note 3 (specification of error in granting or denying nonsuit); p. 831, note 7 (review upon appeal from order on motion for new trial); p. 838 (scope of review on appeal from order granting dismissal); p. 864 (presumptions upon appeal); p. 902 (review of discretion of trial court); p. 917 (order upon motion for nonsuit as a question of law); p. 1025 (harmless error).

9. See New Trial.

10. See Appeal and Error, vol. 2, p. 743.

11. See Ejectment, and Adverse Possession, vol. 1, p. 559.

12. See Brokers, vol. 4, p. 634.

13. See Elections.

slander suits,[14] and in criminal prosecutions.[15] So also the following matters are treated elsewhere; the compromise and settlement of claims,[16] the dismissal of a suit on compromise as a consideration for a contract,[17] the right to sue upon undertakings filed in the action after dismissal thereof,[18] and the power of a court to direct a verdict.[19]

§ 2. **Definitions and Distinctions.**—A judgment of nonsuit at common law was a judgment rendered where the plaintiff, after giving his evidence, found that it would not sustain his case, and voluntarily made default by absenting himself when called on to hear the verdict.[20] Although judgment was rendered against him, the proceeding was really for his benefit, because after nonsuit he could institute another action for the same cause. The proceeding is analogous to that under the code where the plaintiff seeks to dismiss his action before trial.[1] This proceeding was not recognized in equity, but the dismissal of the bill had in many instances the same effect.[2] The term "dismissal" has been used in courts of law only at a comparatively late period. As used in those courts, it seems always to have been applied to a removal out of court prior to a judgment on the merits. After judgment for the plaintiff, an action cannot be dismissed on motion of defendant. The judgment, except when appealed from, can only be satisfied by him.[3] By section 581 of the Code of Civil Procedure, involuntary nonsuits are allowed in this state, and the two steps in procedure in the trial of a cause are made equivalent to each other, and

14. See Libel and Slander.

15. See Criminal Law, vol. 7, p. 1001.

16. See Compromise and Settlement, vol. 5, p. 383.

17. See Contracts, vol. 6, p. 177.

18. See Claim and Delivery, vol. 5, pp. 215, 216.

19. See Criminal Law, vol. 8, p. 284; Trial.

20. Page v. Superior Court, 76 Cal. 372, 18 Pac. 385.

1. See infra, § 3.

2. Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

3. People v. Latham, 53 Cal. 386.

without any distinction between their effect. Since in California there is but one form of civil action, it follows that a judgment of nonsuit may be entered in a suit for equitable relief, or a common-law action may be dismissed, with the like effect in each.[4]

A retraxit occurred at common law when a plaintiff came into court in person and voluntarily renounced his suit or cause of action. When this was done and a judgment was entered in favor of the defendant the plaintiff's cause of action was forever gone.[5] A judgment of dismissal which is entered in pursuance to an agreement of the parties in open court and which amounts to an adjustment of the merits of the controversy by the parties themselves is in effect a retraxit and will bar a subsequent action. In the absence of anything to the contrary expressed in the agreement or in the judgment itself, the judgment will be understood to have this effect.[6] It has been stated that the courts are not inclined to extend the doctrine of retraxit as recognized in these cases.[7] And it has been held that a dismissal upon the written consent of the parties will not have that effect.[8]

4. Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

5. Westbay v. Gray, 116 Cal. 660, 48 Pac. 800 (quoted in Hibernia Sav. & L. Soc. v. Portener, 139 Cal. 90, 72 Pac. 716); Rincon Water & Power Co. v. Anaheim Union Water Co., 115 Fed. 543. See Attorneys at Law, vol. 3, p. 664, as to authority of attorney to enter retraxit.

6. Westbay v. Gray, 116 Cal 660, 48 Pac. 800; Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704; Stoutenborough v. Board of Education, 104 Cal. 664, 38 Pac. 449 (holding an order dismissing an action on the ground that it had been settled does not operate as a retraxit, when it was not made on the motion of the plaintiff or upon his written consent); Crossman v. Davis, 79 Cal. 603, 21 Pac. 963; Lord v. Dunster, 79 Cal. 477, 21 Pac. 865 (holding the dismissal of an election contest before any appearance was made therein did not operate as a retraxit); Merritt v. Campbell, 47 Cal. 542; McCord v. Martin, 32 Cal. App. Dec. 404, 191 Pac. 89. See Compromise and Settlement, vol. 5, p. 402; Judgments.

7. Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

8. Rincon Water & Power Co. v. Anaheim Union Water Co., 115 Fed. 543 (disapproving a contrary dictum

II. Voluntary.

§ 3. In General.—Under the law of California an action may be dismissed:

"By the plaintiff himself, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs; provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon."[9]

This provision is in accordance with the policy of the law to discourage litigation.[10] Under it a plaintiff has an absolute right to dismiss his action,[11] at any time before submission of the case,[12] upon payment of the legal fees for entering judgment,[13] if there is no claim by the defendant for affirmative relief.[14] A plaintiff has a right to dismiss, even though his action may have been consolidated with other actions, as each action is to be considered as a separate action notwithstanding the consolidation.[15] And this right is not affected by the death of an adverse party and the omission to substitute his successor in interest,[16] or by the fact that a judgment of

in the opinion of Justice Wallace in Merritt v. Campbell, 47 Cal. 542).

9. Code Civ. Proc., § 581, subd. 1. The Practice Act contained a similar provision.

10. Los Angeles Gas & E. Corp. v. Superior Court, 35 Cal. App. Dec. 800, 200 Pac. 811.

11. James v. Center, 53 Cal. 31. As to right of plaintiff to dismiss an action brought in behalf of himself and others, see 8 A. L. R. 950, note. Voluntary dismissal of replevin suit as affecting defendant's right to return of property, see 2 A. L. R. 200, note.

12. See infra, § 5.

13. See infra, § 7.

14. See infra, § 6.

15. Los Angeles Gas & E. Corp. v. Superior Court, 35 Cal. App. Dec. 800, 200 Pac. 811, applying rule to actions consolidated pursuant to section 26 of the Workmen's Compensation, Insurance and Safety Act (Stats. 1919, p. 920). See Actions, vol. 1, p. 373.

16. Sheldon v. Gunn, 56 Cal. 582 (holding that the right of the inter-

dismissal has been improvidently and illegally entered by the clerk.[17]

To what actions statute applies.—The provision relating to voluntary dismissals quoted in last section is general in nature, providing a rule of procedure in actions not subject to some special requirement made by law. It relates, for example, to an action in interpleader,[18] and to an action which has been referred to a referee.[19] But it does not apply to condemnation proceedings as the code provides a special rule to be followed in dismissing such proceedings.[20]

Dismissal of intervention.—An intervener is equally an actor in the case with the plaintiff and he can dismiss his complaint in intervention if no relief is prayed against him.[1]

§ 4. Dismissal as to Certain Defendants.—In an action against several defendants a plaintiff may dismiss as to one or more defendants and proceed against those remaining, where their liability is joint and several, as in actions ex delicto.[2] A plaintiff in an ejectment suit may, if he chooses, dismiss his action as to any of the defendants or any of the land sued for, there being no claim for affirmative relief.[3] In an action to foreclose a lien upon personal property, he may dismiss as to the owner if no affirmative relief has been prayed for.[4] And in an action to foreclose a street assessment lien a plaintiff has the

vener to dismiss is not affected by the death of one of the parties plaintiff and the omission to substitute his successor in interest).

17. Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904.

18. Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904.

19. Plant v. Fleming, 20 Cal. 92.

20. Silver Lake Power & Irr. Co. v. Los Angeles, 32 Cal. App. 123, 162 Pac. 432. See Eminent Domain.

1. Sheldon v. Gunn, 56 Cal. 582,

2. Heath v. Manson, 147 Cal. 694, 82 Pac. 331. See Parties.

3. McLeran v. McNamara, 55 Cal. 508; Dimmick v. Deringer, 32 Cal. 488; Reed v. Calderwood, 22 Cal. 463. See Ejectment.

4. Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 Pac. 516.

right to dismiss his action against any person who had not been served with process.[5] It is expressly provided that "When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants."[6] The plaintiff in such case may dismiss his action as to the defendants not served and proceed to trial against the rest.[7] So also he may dismiss his action, notwithstanding the filing of a complaint in intervention which does not ask affirmative relief,[8] but he may not dismiss his action as to the intervener alone and proceed as to the other parties, and in that manner annul the order permitting an intervention.[9]

When a party is dismissed from an action he becomes a stranger thereto. He cannot take any part therein;[10] and no judgment can be rendered against him until the dismissal is vacated.[11] The effect of the dismissal is the same as if the defendant dismissed had never been made a party.[12] The dismissal does not ordinarily operate as a dismissal of the action in toto, however.[13] Yet when an action is brought against an incompetent who appears by a general guardian, and no attempt is made to charge the guardian in his individual capacity, a dismissal as to the ward is in effect a dismissal of the action itself.[14]

5. Harney v. Corcoran, 60 Cal. 314.

6. Code Civ. Proc., § 414, based on Practice Act, § 32.

7. People v. Evans, 29 Cal. 429; Wisnom v. McCarthy, 32 Cal. App. Dec. 973, 192 Pac. 337.

8. See infra, § 6.

9. Townsend v. Driver, 5 Cal. App. 581, 90 Pac. 1071.

10. Reed v. Calderwood, 22 Cal. 463.

11. Sere v. McGovern, 65 Cal. 244, 3 Pac. 859.

12. Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 Pac. 516; Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

13. Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409.

14. O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588.

§ 5. Stage of Proceedings When Plaintiff may Dismiss. The words "before trial" in the provision authorizing a voluntary dismissal by a plaintiff have been construed as meaning "before submission" of the case. A plaintiff, therefore, may dismiss his case at any time before its final submission, but not afterwards,[15] unless the order of submission is set aside.[16] When an action is tried on the merits without a jury, it is deemed submitted, after the court has taken it under advisement, at the close of the evidence and argument.[17] This is in accord with the common-law rule.[18] The term "submission" here used is not, however, limited to the submission of the case after a trial of the merits after answer, for there may be a trial on a general demurrer to a complaint as will effectually dispose of the case where the plaintiff has alleged all the facts constituting his cause of action. If the demurrer is sustained and the plaintiff declines to amend, nothing remains to be done except render judgment for the defendant. In that event there is a trial within the meaning of the statute which will preclude a dismissal.[19] But when the plaintiff takes leave to amend, he virtually asserts that he has not set up his whole case. The case is left open, leaving to the plaintiff the option either to dismiss, amend, or allow its time to expire and judgment to be entered.[20]

15. MacDermot v. Grant, 181 Cal. 332, 184 Pac. 396; Casey v. Jordan, 68 Cal. 246, 9 Pac. 92, 305; Heinlin v. Castro, 22 Cal. 100; Brown v. Harter, 18 Cal. 76; Hancock Ditch Co. v. Bradford, 13 Cal. 637. (Although the court in this case states that by the word "trial" is meant the determination or finding in the case, it is evident from the concluding portion of the opinion that the court construed the words "before trial" as meaning "before submission"); Rutherford v. Peppa, 35 Cal. App. Dec. 496, 199 Pac. 1111, citing cases from other jurisdictions.

16. Westbay v. Gray, 116 Cal. 660, 48 Pac. 800.

17. MacDermott v. Grant, 181 Cal. 332, 184 Pac. 396 (citing cases from other jurisdictions); Heinlin v. Castro, 22 Cal. 100.

18. Hancock Ditch Co. v. Bradford, 13 Cal. 637.

19. Goldtree v. Spreckels, 135 Cal. 666, 67 Pac. 1091, citing cases from other jurisdictions.

20. Richards v. Bradley, 129 Cal. 670, 62 Pac. 316; Home Real Estate

§ 6. Effect of Claim for Affirmative Relief.—While formerly the provision under discussion precluded a plaintiff from dismissing his action only when a counterclaim had been made, the section as amended in 1877 and as it now stands precludes a dismissal if a counterclaim has been set up or if affirmative relief is sought by the cross-complaint or answer of the defendant. This provision is applicable to divorce suits,[1] quiet title suits,[2] and civil actions in general. If there is no pleading on file claiming affirmative relief at the time the plaintiff files a request for a dismissal, the subsequent filing of such a pleading will not cut off the right to a dismissal.[3] On the other hand, if a claim for affirmative relief is set up, a plaintiff cannot afterwards dismiss the action without the consent of the defendant,[4] unless it is first stricken out.[5] Any attempted dismissal in the latter case is a nullity, and if the case is regularly set for trial, it is the duty of the plaintiff to attend at the time appointed. If he fails the defendant may proceed with his case and take judgment.[6] A cross-complainant is in the same position wth reference to the right to dismiss as an original plaintiff, and he cannot dismiss without the consent of the parties praying affirmative relief as against the matters set forth in the cross-complaint.[7]

Co. v. Winnants, 39 Cal. App. 643, 179 Pac. 534. See Pleading.

1. Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1142. See Divorce and Separation.

2. See infra, this section.

3. Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904; Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 301. But see Acock v. Halsey, 90 Cal. 215, 27 Pac. 193, in which an answer was filed after the entry in the clerk's register, but before entry of judgment of dismissal.

4. Robinson v. Placerville & S. V. R. R. Co., 65 Cal. 263, 3 Pac. 878; Clark v. Hundley, 65 Cal. 96, 3 Pac. 131; People v. Pratt, 28 Cal. 166; Montgomery v. Neilon, 41 Cal. App. 184, 182 Pac. 456; Belleau v. Thompson, 33 Cal. 495 (holding, however, that the answer of the defendant in question did not constitute a counterclaim so as to preclude a dismissal).

5. Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171; Thompson v. Spraig, 66 Cal. 350, 5 Pac. 506.

6. Thompson v. Spray (Cal.), 4 Pac. 418.

7. Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975.

If matter pleaded as a counterclaim is not a proper subject thereof, the clerk, although a ministerial officer, may enter a dismissal in a proper case. While in such a case he would enter into an inquiry quasi-judicial he would not thereby be made a judicial officer. Ministerial officers are frequently required to make such inquiry antecedent to official action.[8] The rule is otherwise where a demurrer to the claim of affirmative relief has been passed upon and overruled by the court. The clerk in such case has no power to review and overrule the order of court and enter a dismissal on the ground the cross-demand is in fact insufficient, the remedy being by an appeal.[9] Again, the mere fact that an answer is filed after the expiration of the time therefor, no default having been entered, does not justify treating it as a nullity so long as it remains on file. And if it claims affirmative relief, it will cut off the plaintiff's right to dismiss.[10]

It has been said that "affirmative relief means relief which the defendant would not get by a judgment that plaintiff's allegations are all true."[11] While this may furnish a test in many cases for determining whether a plaintiff is precluded by defendant's pleadings from dismissing his action, it is not an absolute test, as indicated, for example, by the holdings in quiet title suits. While it is not necessary for a defendant in a quiet title suit to file a cross-complaint when he is the owner and in possession, yet it is settled that a cross-complaint setting up his ownership and asking an adjudication in his favor presents a claim for affirmative relief which prevents a plaintiff from dismissing his action.[12] In a replevin suit in

8. Page v. Superior Court, 76 Cal. 372, 18 Pac. 385; James v. Center, 53 Cal. 31; Belleau v. Thompson, 33 Cal. 495.

9. Montgomery v. Neilon, 41 Cal. App. 184, 182 Pac. 456.

10. Acock v. Halsey, 90 Cal. 215, 27 Pac. 193.

11. Islais & Salinas Water Co. v. Allen, 132 Cal. 42, 64 Pac. 713, per Temple, J., dissenting.

12. Islais & Salinas Water Co. v. Allen, 132 Cal. 432, 64 Pac. 713 (overruling Wood v. Jordan, 125 Cal. 263, 57 Pac. 998); Dellaringa v. Hooker, 31 Cal. App. 667, 161 Pac.

which the property involved is delivered to the plaintiff upon proper process, a demand by the defendant for the return and redelivery of the property is clearly a demand for affirmative relief.[13] However, a complaint in intervention which merely resists the plaintiff's claim does not prevent the dismissal of the action.[14] It is sometimes a difficult matter to draw a line between a counterclaim and a defense, and therefore to avoid uncertainty the rule has been laid down that to make a counterclaim or cross-complaint effective to prevent a dismissal it must be denominated as such.[15]

§ 7. **Procedure to Procure Dismissal.**—If a defendant has not asked for any affirmative relief, the plaintiff has a right to dismiss his action without applying to the court,[16] by a written request to the clerk filed with the papers in the case.[17] Although the code states that the action may be dismissed "by the plaintiff himself," it is settled that the dismissal may be made through his attorney. Indeed, no dismissal can be entered unless upon written consent of the attorney of record,[18] or if said consent is not obtained, upon order of the court, after notice to the attorney.[19] The only costs which a plaintiff is required to pay before dismissal of his action are the clerk's costs for entering the order.[20] He is not required

276; Brooks v. White, 22 Cal. App. 719, 136 Pac. 500. But see Moyle v. Porter, 51 Cal. 639, decided before the amendment of 1877. See Quieting Title.

13. Acock v. Halsey, 90 Cal. 215, 27 Pac. 193.

14. Henry v. Vineland Irr. Dist., 140 Cal. 376, 73 Pac. 1061.

15. Carpenter v. Hewel, 67 Cal. 589, 8 Pac. 314; Brannan v. Paty, 58 Cal. 330; Ward v. Goetting, 44 Cal. App. 435, 186 Pac. 640, citing Shain v. Belvin, 79 Cal. 262, 21 Pac. 747.

16. Islais & Salinas Water Co. v. Allen, 132 Cal. 432, 64 Pac. 713.

17. Code Civ. Proc., § 581, subd. 1.

18. Boca & Loyalton R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718. See Attorneys at Law, vol. 3, p. 654.

19. Code Civ. Proc., § 581 (Stats. 1919, p. 116).

20. Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299; Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75; Home Real Estate Co. v. Winnants, 39 Cal. App. 643, 179 Pac. 534.

to prepay the defendant's costs. The utmost of a defendant's right under the circumstances is to present his cost bill in due time after dismissal, to have it settled, and take judgment for his costs against the plaintiff accordingly.[1] And if the judgment be entered by the clerk without payment, its validity cannot be questioned.[2]

While it is often more convenient for a plaintiff to resort to the mode of procuring a dismissal just outlined, this mode is not exclusive or mandatory. And there is no objection to the plaintiff's making a motion to the court for an order of dismissal, which, when entered, should be noted by the clerk in his register of actions.[3] A defendant is not entitled to notice of the plaintiff's motion, and he cannot by making a demand for a change of venue deprive the plaintiff of his right to dismiss, as the rule that no judicial action can be taken pending such a demand has no application.[4]

§ 8. Dismissal upon Consent of Parties.—It is provided that an action may be dismissed "by either party, upon the written consent of the other."[5] Where there is an attorney of record no dismissal can be entered under this provision unless upon the written consent of such attorney of record,[6] or if said consent is not obtained, upon order of the court, after notice to the attorney.[7] This is

1. Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299; Hancock Ditch Co. v. Bradford, 13 Cal. 637; Spinks v. Superior Court, 26 Cal. App. 793, 148 Pac. 798. See infra, § 17.

2. Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75.

3. Richards v. Bradley, 129 Cal. 670, 62 Pac. 316; McDonald v. California Timber Co., 2 Cal. App. 165, 83 Pac. 172.

4. McDonald v. California Timber Co., 2 Cal. App. 165, 83 Pac. 172. See Venue.

5. Code Civ. Proc., § 581, subd. 2. Title Ins. & Trust Co. v. Lusk, 15 Cal. App. 358, 115 Pac. 53 (holding that Code Civ. Proc., § 581, subd. 2, does not apply to proceedings under the Street Improvement Act of 1909).

6. MacDermot v. Grant, 181 Cal. 332, 184 Pac. 396; Board of Commrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164, approved in Boca & Loyalton R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718.

7. Code Civ. Proc., § 581 (Stats. 1919, p. 116).

in accord with the rule that where a party has an attorney a court has no authority to recognize anyone in the conduct or disposition of the case except the attorney of record.[8]

§ 9. Entry and Judgment.—Section 581 of the Code of Civil Procedure provides that

"The dismissals mentioned in said subdivisions one and two hereof, when written consent of the attorney of record of the party requesting the dismissals are filed, may be made by entry in the clerk's register."[9]

It is the duty of the clerk to enter a dismissal as provided in this section, in a proper case, and when his fee is paid.[10] And if he should refuse to do so, he will, on motion, be compelled by the court to enter a dismissal.[11]

Formerly, the statute provided that upon the entry of the dismissal in the clerk's register, judgment might be entered accordingly.[12] Under this provision it was held in a number of cases that the action was still pending and that the court had not lost jurisdiction of the case until the entry of judgment of dismissal.[13] This provi-

8. See Attorneys at Law, vol. 3, p. 654.

9. See infra, § 17, as to costs.

10. Southern California M. Water Co. v. Cameron, 141 Cal. 283, 74 Pac. 838 (holding the plaintiff's right to dismiss was not affected by the stipulation set forth in the opinion). McLeran v. McNamara, 55 Cal. 508.

11. Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299; Page v. Superior Court, 76 Cal. 372, 18 Pac. 385.

12. Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904 (holding under the former state of the law that the right to dismiss cannot be defeated by the filing of a pleading demanding affirmative relief after entry of a dismissal and before judgment).

13. Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26; Evans v. Johnston, 115 Cal. 180, 46 Pac. 906; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298 (holding that until judgment the court had not lost jurisdiction, and that if, notwithstanding plaintiff's request for dismissal, an answer is filed and the court proceeds to trial and judgment, such judgment is valid even as against a direct attack); Rochat v. Gee, 91 Cal. 355, 27 Pac. 670; Page v. Page, 77 Cal. 83, 19 Pac. 183; Page v. Superior Court, 76 Cal. 372, 18 Pac. 385. But see Thompson v. Spraig, 66 Cal. 350, 5 Pac. 506 (holding that a trial after

sion was eliminated by amendment in 1895; and it has been held that the change in the statute was designed to be and is in fact a substantial change. The rule since the amendment is that the mere entry of the order upon the clerk's register is sufficient to effect a dismissal. And if in a proper case the clerk refuses to make a proper entry, the only jurisdiction left in the court is jurisdiction to order him to make it.[14] In other words, the effect of the filing by the plaintiff of a written request for a dismissal and consent of his attorney thereto is, ipso facto, to dismiss the case, even though the clerk fails to make the proper entry.[15]

When, instead of pursuing the statutory mode, a plaintiff, by motion in open court, invokes the inherent power of the court to dismiss the case, as he may do,[16] he has no absolute right to a dismissal, and an order denying the motion is within the jurisdiction of the court, and is not reviewable by certiorari.[17]

A voluntary dismissal by a plaintiff is not a bar to another action concerning the matters involved therein.[18]

an entry of dismissal was erroneous); McLeran v. McNamara, 55 Cal. 508, holding that where an action is dismissed as to certain defendants, the dismissal became operative as soon as filed and entered by the clerk, and that if a judgment should have been entered, the law will presume that was done which should have been done. See ABATEMENT AND REVIVAL, vol. 1, p. 27, note 16; ACTIONS, vol. 1, p. 380.

14. Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299, holding that prohibition will lie to prevent the court from proceeding with the trial for the reason that the court has been ousted of jurisdiction by the act alone of the plaintiff.

15. Huntington Park Co. v. Superior Court, 17 Cal. App. 692, 121 Pac. 701 (citing Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299; Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904); McIntosh v. Robb, 4 Cal. App. 484, 88 Pac. 517 (holding that the failure of the clerk to enter the dismissal did not prevent the plaintiff from commencing a new action. Compare the comment upon this case in ABATEMENT AND REVIVAL, vol. 1, p. 28).

16. See supra, § 7.

17. Huntington Park Co. v. Superior Court, 17 Cal. App. 692, 121 Pac. 701.

18. See JUDGMENT. See supra, § 4, as to effect of dismissal as to certain defendants. See infra, § 16, as to effect of dismissals in general.

§ 10. Vacation of Dismissal.—A court has jurisdiction to hear and determine a motion of the defendant for an order vacating a dismissal entered by a plaintiff which is improper because of a counterclaim or cross-complaint or for some other reason.[19] Even where the entry was properly made, an order vacating it, although erroneous,[20] is not void. And if not appealed from, it operates permanently to vacate and annul the entry in the clerk's register, and to leave the case in the condition it was prior to plaintiff's request for a dismissal.[1] A defendant cannot have a dismissal set aside on the ground that it was entered in violation of a stipulation, where he, being present in court at the hearing of the motion, failed to bring such stipulation to the attention of the court.[2]

Vacation of dismissal on consent of parties.—If the consent of a party to a dismissal of an action is obtained by the fraud of the adversary, the court has power to release him from an order of dismissal if the circumstances justify it.[3] Where it is shown that the consent was given under a mistake of fact, relief may be had under section 473 of the Code of Civil Procedure,[4] provided there is no laches.[5] To authorize such relief, it is not necessary that the mistake be mutual, or that it be induced by the fraud of the other party.[6] After the plaintiff has transferred his interest in the subject matter of the action, he is di-

19. Page v. Superior Court, 76 Cal. 372, 18 Pac. 385; Casey v. Jordan, 68 Cal. 246, 9 Pac. 92, 305. See Whipley v. Dewey, 17 Cal. 314, holding under the former practice that the motion must be made before the expiration of the term.

20. James v. Center, 53 Cal. 31.

1. Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143; S. C., 6 Cal. Unrep. 266, 57 Pac. 73; Page v. Superior Court, 76 Cal. 372, 18 Pac. 385.

2. Higgins v. Mahoney, 50 Cal. 444.

3. Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26.

4. Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474 (where a plaintiff by mistaken oversight settled his action for less than the full amount of his claim and consented to a dismissal).

5. Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26.

6. Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474; Sheehan v. Osborne, 6 Cal. Unrep. 979, 69 Pac. 842.

vested of all power to control the action and is without authority to consent to its dismissal. And a dismissal entered upon the stipulation of the original plaintiff will be set aside on motion of the transferee.[7]

III. Involuntary.

A. In General.

§ 11. Nonappearance of Party.—Section 581 of the Code of Civil Procedure declares that an action may be dismissed or a judgment of nonsuit entered:

"3. By the court when either party fails to appear on the trial, and the other party appears, and asks for the dismissal."[8]

The Practice Act contained a similar provision, confined, however, to the nonappearance of the plaintiff. The code provision was the same as the Practice Act prior to 1907, at which time it was amended so as to authorize the plaintiff, as well as the defendant, to ask for the dismissal of an action if his adversary does not appear at the trial. Although either party may have the case set down for trial and have it dismissed if the other does not appear, the court should not grant a dismissal except upon proof made in compliance with section 594 of the Code of Civil Procedure that the adverse party has had five days' notice of the time of trial.[9] The party setting the case down for hearing is not, however, obliged

7. Walker v. Felt, 54 Cal. 386.

8. See infra, § 40, as to entry of dismissal.

9. Estate of Dean, 149 Cal. 487, 87 Pac. 13. Compare Pickett v. Hastings, 39 Cal. 105, decided under the Practice Act before the amendment requiring proof of notice of trial, and holding that although the plaintiff after filing his complaint may have absented himself, and may have been ignorant of the action of the defendant in setting the case for trial and in dismissing it, he has no cause for complaint where he was not acting under some mistake of law and was not lulled into security by something which the defendant had said or done.

to ask for a dismissal. It is his right under section 594 to proceed with the case and to have a judgment entered finally disposing of the case.[10] It may be fairly said that the plaintiff fails to appear when the case is called for trial, within the meaning of section 581, where the plaintiff's attorney appears just after the defendant moves for a dismissal, but declines to prosecute the action further.[11]

Vacation.—A judgment of dismissal entered because of the nonappearance of the plaintiff may be set aside upon good cause being shown therefor.[12] It may be vacated in the discretion of the court where the plaintiff and his attorney appear in court within a few minutes after the entry of the dismissal and at once apply for a vacation of the order.[13] So also the judgment should be vacated where the cause was omitted from the trial calendar and the clerk informed the plaintiff that the case would not be tried until reset, and the plaintiff relying upon such information absented himself from the courtroom.[14]

§ 12. Failure to Pay Costs on Change of Venue.—Section 581b of the Code of Civil Procedure provides as follows:

"No action heretofore or hereafter commenced, where the same was not originally commenced in the proper county, shall be further prosecuted, and no further pro-

10. Clune v. Quitzow, 125 Cal. 213, 57 Pac. 886. See Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121, where the court say that this section "has never been regarded as mandatory, and if it were, the party in default could apply for relief under section 473, when his neglect may be excused." See, also, Peralta v. Mariea, 3 Cal. 185, where the court say that when the defendant moves for a nonsuit, the court has no alternative but to grant it.

11. Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

12. Lodtman v. Schluter, 71 Cal. 94, 16 Pac. 540, holding the dismissal should be vacated where the plaintiff's counsel wrote or telegraphed the defendant and the court that he could not be in court on the day of the trial, and received no answer to his letter or dispatch and believed the cause would be continued.

13. Ashton v. Dashaway Assn., 4 Cal. Unrep. 27, 33 Pac. 446.

14. Lynch v. De Boom, 26 Cal. App. 311, 146 Pac. 908.

ceedings shall be had therein, and all such actions heretofore or hereafter commenced must be dismissed by the court to which the same shall have been transferred, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the costs and fees of transmission of the pleadings and papers therein to the clerk or justice of the court to which it is transferred, or of filing the papers anew, have not been paid by the plaintiff for one year after the time when such pleadings or papers shall have arrived in the custody of such clerk or justice. The clerk of such court, or such justice shall, where such court or justice desires to dismiss an action under the provisions of this section, file anew such transferred pleadings and papers without fee."[15]

Like section 581a of the Code of Civil Procedure this section is mandatory. Under the conditions set forth in it a trial court is without jurisdiction to do anything in the action except dismiss it.[16] Whether or not the court has power in a proper case under section 473 of the Code of Civil Procedure to relieve a party from a dismissal under this section, the mere neglect of counsel to pay the fees will not authorize a vacation of the order.[17]

§ 13. Questions Relating to Parties.—An objection that there is a defect of parties must be raised by demurrer or answer.[18] If the objection is not so raised it is waived and cannot be taken advantage of for the first time on a motion for nonsuit.[19] But when the defect of parties

15. See infra, § 21, as to entry of dismissal.

16. Davis v. Superior Court, 184 Cal. 691, 195 Pac. 390; Abraham v. King, 34 Cal. App. Dec. 757, 197 Pac. 659. See infra, § 23.

17. Davis v. Superior Court, 184 Cal. 691, 195 Pac. 390.

18. See PARTIES.

19. Stackpole v. Pacific Gas & Electric Co., 181 Cal. 700, 186 Pac. 354; Baldwin v. Second St. Cable R. R. Co., 77 Cal. 390, 19 Pac. 644 (where a married woman sued for damages for personal injuries without joining her husband). Pavisich v. Bean, 48 Cal. 364; McKee v. Greene, 31 Cal. 418; Whitney v. Stark, 8 Cal. 514, 68 Am. Dec. 360. See Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81, holding it

plaintiff is presented by the answer and the evidence clearly establishes the truth of the plea as a matter of law, it seems that the objection may be raised by motion to dismiss.[20] It has been held that a misjoinder of parties plaintiff which does not appear on the face of the complaint may be pleaded in the answer, and may be made a ground of nonsuit against all the plaintiffs.[1] When a plaintiff has not brought himself within the statute authorizing him to designate parties by fictitious names a person served with summons as a party designated by a fictitious name may move to dismiss the action as against him, and if the plaintiff does not offer to insert the true name in the complaint the motion may be granted.[2] If a plaintiff fails to prove his case against one of several defendants, the court has power upon motion to dismiss the action as to such defendant and give him judgment against the plaintiff for his costs, notwithstanding the action is to proceed as between the remaining parties.[3] So also in an action involving real property, a disclaimer by a defendant may authorize a dismissal of the action as against him in a proper case. A dismissal will not be granted, however, where the defendant disclaiming was one of the confederates in an attempt to unjustly obtain the property of the plaintiff, as a disclaimer in such case will not exempt him from liability for costs incurred in defeating the conspiracy.[4] So also an action will not be dismissed as against a defendant who, instead of filing a

error to grant a nonsuit on the ground of nonjoinder of a party where he was not a necessary party.

20. Burr v. United Railroads, 163 Cal. 663, 126 Pac. 873, holding that as the evidence to prove joint ownership of the property sued for was conflicting, the question of ownership was one of fact to be resolved by the jury and the court could not say as a matter of law that there was a defect of parties plaintiff.

1. South Fork & Placerville Canal Co. v. Snow, 49 Cal. 155.

2. Rosencrantz v. Rogers, 40 Cal. 489.

3. Rowe v. Simmons, 113 Cal. 688, 45 Pac. 983. See infra, § 32, as to dismissal for failure of proof in general.

4. Dupuy v. Leavenworth, 17 Cal. 262.

disclaimer, answers denying the plaintiff's ownership of the property.[5] Of course it would be improper to grant a nonsuit as to one, who is a proper, if not a necessary party, defendant.[6]

§ 14. Want of Cause of Action.—While an objection that a complaint does not state a cause of action is not available upon a motion for a nonsuit, or to dismiss,[7] a court, upon sustaining a general demurrer to a complaint, may order a dismissal of the action if no leave to amend is requested.[8] If the complaint is stricken out by consent of the parties it is proper to dismiss the action.[9] A court will dismiss an action founded upon an instrument which is invalid.[10] And if the instrument is contrary to public policy and void, the court may dismiss the action although the defendant may not have questioned its legality.[11]

5. Johnston v. Baker, 167 Cal. 260, 139 Pac. 86.

6. Young v. New Pedrara Onyx Co., 32 Cal. App. Dec. 439, 192 Pac. 55.

7. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352; Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351; Hunt v. Sharkey, 20 Cal. App. 690, 130 Pac. 21 (but the error in granting a nonsuit on this ground is harmless where the insufficiency of the plaintiff's proof is disclosed by the record, and it is apparent that no facts exist which will enable the plaintiff to amend his complaint or supply the evidence entitling him to recover); Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929. See King v. Montgomery, 50 Cal. 115, holding a motion to dismiss was properly granted where the plaintiff declined to amend. The latter case, however, has been cited in subsequent cases as authority for a motion for judgment on the pleadings when the complaint fails to state a cause of action. Hibernia Sav. & Loan Soc. v. Thornton, 117 Cal. 481, 49 Pac. 573; De Toro v. Robinson, 91 Cal. 371, 27 Pac. 671.

8. Bell v. Bank of California, 153 Cal. 234, 94 Pac. 889; Saddlemire v. Stockton Sav. & Loan Soc., 144 Cal. 650, 79 Pac. 381; Becker v. Ferrier, 2 Cal. Unrep. 225; Start v. Heinzerling, 27 Cal. App. 145, 149 Pac. 50 (holding a judgment of dismissal was improper, as the order striking out one cause of action was tantamount to an amendment within the meaning of the rule). See Pleading.

9. Smith v. Ling, 73 Cal. 72, 14 Pac. 390.

10. Wheatley v. Consolidated Lumber Co., 167 Cal. 441, 139 Pac. 1057.

11. Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735; Alpers v. Hunt, 86

§ 15. **Miscellaneous Grounds of Dismissal.**—While at one time the law authorized the dismissal of a complaint for disobedience by a plaintiff of certain orders of a court, it now provides merely that such disobedience may be punished as a contempt.[12] A motion to dismiss is not a proper remedy by which to urge the bar of a former judgment pleaded in the answer.[13]

Want of authority to bring suit.—Since the unauthorized institution of an action by an attorney might result in compelling a defendant to litigate the same cause of action twice, a court will dismiss an action where the want of authority in the attorney is shown.[14] But the reason ceases and with it the rule, if the act of the attorney is subsequently ratified by the plaintiff. In this respect the case of attorney and client cannot be distinguished from other kinds of agency.[15]

Want of jurisdiction.—A motion to dismiss a complaint on the ground of want of jurisdiction of the subject-matter of the action amounts in legal effect to a demurrer to the complaint on that ground. It necessarily calls for relief which may be demanded only by a party to the record, and by making such a motion a party makes a general appearance.[16]

Upon plaintiff's abandonment of suit.—Under the Code of Civil Procedure an action may be dismissed "4. By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it."[17] An at-

Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846; Valentine v. Stewart, 15 Cal. 387.

12. See Contempt, vol. 5, p. 934.

13. Forrester v. Lawlor, 14 Cal. App. 170, 111 Pac. 284. See Judgment.

14. Ventura County v. Clay, 119 Cal. 213, 51 Pac. 189; Magnolia & H. Fruit Cannery v. Guerne, 3 Cal. Unrep. 589, 31 Pac. 363; Clark v. Willett, 35 Cal. 534; Turner v. Caruthers, 17 Cal. 431. See Attorneys at Law, vol. 3, p. 658.

15. People v. Madden, 133 Cal. 347, 65 Pac. 741. See Attorneys at Law, vol. 3, p. 646.

16. Roberts v. Superior Court, 30 Cal. App. 714, 159 Pac. 465. See Appearance, vol. 3, p. 8.

17. Code Civ. Proc., § 581. See Pardy v. Montgomery, 77 Cal. 326,

tempted abandonment of the case after the final submission of the case is not within the application of this section.[18]

Delay in entering judgment.—It was formerly provided that an action may be dismissed by the court when after verdict or final submission the party entitled to judgment neglected to have it entered for more than six months.[19] This provision was omitted in 1907 because the changes made in section 664 of the Code of Civil Procedure require judgment to be entered without any demand therefor.[20]

§ 16. Effect of Dismissal.—A dismissal of an action is a final decision of the action, and has the effect of terminating it. For all the purposes connected with the proceedings in the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication on the merits.[1] It is in effect a final judgment in favor of the defendant.[2] An order of nonsuit when entered by the clerk ipso facto dissolves an attachment, in the absence of an appeal therefrom within five days as provided in sections 553 and 946 of the Code of

19 Pac. 530. This case cites Code Civ. Proc., § 581, but does not show the precise ground upon which the dismissal was granted. See infra, § 40, as to entry of dismissal.

18. MacDermot v. Grant, 181 Cal. 332, 184 Pac. 396.

19. Code Civ. Proc., § 581, subd. 6, added by amendment in 1885. See the following cases decided under the former state of the law: Rickey Land & Cattle Co. v. Glader, 153 Cal. 179, 94 Pac. 768; San Jose Ranch Co. v. San Jose Land & W. Co., 126 Cal. 322, 58 Pac. 824; In re Blythe's Estate, 110 Cal. 226, 42 Pac. 641; Marshall v. Taylor, 97 Cal. 422, 32 Pac. 515; In re McDevitt, 95 Cal. 17, 30 Pac. 101; Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121 (holding the section is not mandatory); Gardner v. Tatum, 77 Cal. 458, 19 Pac. 879; Waters v. Dumas, 75 Cal. 563, 17 Pac. 685; Neihaus v Morgan, 5 Cal. Unrep. 391, 45 Pac. 255; Jones v. Chalfaut, 3 Cal. Unrep. 585, 31 Pac. 257; Fitzhugh v. Mason, 2 Cal. App. 220, 83 Pac. 282.

20. See Judgment, as to entry of judgment.

1. Hugren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 Pac. 168; Frahm v. Walton, 130 Cal. 396, 62 Pac. 618; Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; Leese v. Sherwood, 21 Cal. 151; Dowling v. Polack, 18 Cal. 625.

2. Dowling v. Polack, 18 Cal. 625.

Civil Procedure,[3] and the lien is not revived by a vacation of the order.[4] If an injunction was issued or a receiver appointed, the dismissal dissolves the injunction, and discharges the receiver and the sureties on his bond from any subsequent liability.[5] Whether a dismissal operates as a bar to another action for the same cause depends upon whether it is upon the merits, or whether it amounts to a retraxit.[6]

§ 17. **Costs.**—When an action is dismissed on the motion of the plaintiff,[7] or on motion of the defendant,[8] the defendant is entitled to recover his costs, in the actions mentioned in section 1022 of the Code of Civil Procedure. The omission of certain persons as plaintiff in an amended complaint works a discontinuance as to them which is equivalent to a voluntary dismissal, and it entitles the defendant to a judgment that they take nothing and for costs against them.[9]

Upon the dismissal by a plaintiff a defendant may recover as costs the expense necessarily incurred in good faith and within the limit of the fees prescribed by law to secure the attendance of witnesses. The mere fact that the testimony is rendered unnecessary by the dismissal will not deprive the defendant of his right to recover. The defendant may also be allowed the costs of procuring certified copies of necessary and material documents.[10] In an action for libel and slander, the defendant under

3. Clark v. Superior Court, 37 Cal. App. 732, 174 Pac. 681. See Appeal and Error, vol. 2, p. 474, and Attachment, vol. 3, p. 123.

4. Clark v. Superior Court, 37 Cal. App. 732, 174 Pac. 681.

5. Dowling v. Polack, 18 Cal. 625 (overruling Gelston v. Whitesides, 3 Cal. 309); Heim v. Mooney, 23 Cal. App. 233, 137 Pac. 616.

6. Westbay v. Gray, 116 Cal. 660, 48 Pac. 800. See supra, § 2, and Judgment.

7. Spinks v. Superior Court, 26 Cal. App. 793, 148 Pac. 798; Whitaker v. Moran, 23 Cal. App. 758, 139 Pac. 901. See supra, § 7.

8. Rice v. Leonard, 5 Cal. 61; Matson v. Fortuna High School Dist., 36 Cal. App. Dec. 423, 202 Pac. 167.

9. Spreckels v. Spreckels, 172 Cal. 789, 158 Pac. 543.

10. Whitaker v. Moran, 23 Cal. App. 758, 139 Pac. 901.

statute is allowed one hundred dollars counsel fees in addition to the other costs. But in no case is he entitled to recover fees paid upon his appearance after the action had been dismissed.[11] When a court nonsuits a plaintiff upon a jury trial, it is justified in ordering the plaintiff to pay the jury fees.[12] But costs by way of indemnity should not be taxed in the event of a nonsuit. Thus where judgment was rendered on a nonsuit in favor of several defendants they are not entitled to recover separate costs but can only recover jointly, as though there had been but one defendant.[13]

B. Failure to Prosecute.

§ 18. In General.—It is the duty of a plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination.[14] And it is clearly settled by numerous decisions that if he fails in the performance of that duty, the superior court may, in the exercise of its inherent discretionary powers, dismiss the action. This power of the superior court exists independently of statute, and notwithstanding the statutory provisions authorizing a dismissal where the plaintiff fails to appear upon the trial or abandons the action upon the trial, and notwithstanding the express provision that "In all cases other than those mentioned in the last two sections, judgment must be rendered on the merits."[15]

11. Caffey v. Mann, 3 Cal. App. 124, 84 Pac. 424; S. C., Gaffey v. Mann, 5 Cal. App. 712, 91 Pac. 172. See LIBEL AND SLANDER.

12. Fairchild v. King, 102 Cal. 320, 36 Pac. 649; Lukes v. Logan, 66 Cal. 33, 4 Pac. 883.

13. Rice v. Leonard, 5 Cal. 61 (under the Practice Act).

14. Raggio v. Southern Pacific Co., 181 Cal. 472, 185 Pac. 171.

15. Raggio v. Southern Pacific Co., 181 Cal. 472, 185 Pac. 171; MacDermot v. Grant, 181 Cal. 332, 184 Pac. 396; Overaa v. Keeney, 169 Cal. 628, 147 Pac. 466; Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002 (citing numerous cases); Witter v. Phelps, 163 Cal. 655, 126 Pac. 593; Id., 163 Cal. 814, 126 Pac. 594; Vestal v. Young, 147 Cal. 715, 82 Pac. 381; Martin v. San Francisco, 131 Cal. 575, 63

While sections 581a,[16] 581b,[17] and 583,[18] of the Code of Civil Procedure, have in certain specified instances imposed upon the court a mandatory duty to dismiss the action, it is settled that the power of the court to dismiss for want of prosecution in other cases is unaffected, and remains, as it was before, limited only by a sound discretion.[19] Accordingly it has been held that on motion of a defendant a court may in its discretion dismiss an action for unreasonable delay in the following particulars; in pressing to hearing a demurrer interposed by a defendant,[20] in filing an amended complaint after demurrer sustained,[1] in prosecuting an action to trial and judgment before a referee after it was referred for that purpose,[2] and in filing a remittitur in the trial court after the disposition of an appeal.[3] It is incumbent upon a plaintiff to use due diligence in the matter of pressing to hearing a demurrer filed by a defendant, and a failure to do so is ground for dismissal of the action.[4] This obligation requires him,

Pac. 913; People v. Jefferds, 126 Cal. 296, 58 Pac. 704; McLaughlin v. Clausen, 116 Cal. 487, 48 Pac. 487; First National Bank v. Nason, 115 Cal. 626, 47 Pac. 595; Hassey v. South San Francisco Homestead etc. Assn., 102 Cal. 611, 36 Pac. 945; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; Cowell v. Stuart, 69 Cal. 525, 11 Pac. 57; Kornahrens v. His Creditors, 64 Cal. 492, 3 Pac. 126; Simmons v. Keller, 50 Cal. 38; Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213; Dupuy v. Shear, 29 Cal. 238; Pardy v. Montgomery, 2 Cal. Unrep. 869, 18 Pac. 330 (holding there was no want of prosecution under the facts of the case); Wisnom v. McCarthy, 32 Cal. App. Dec. 973, 192 Pac. 337; Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481; Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658; Code Civ. Proc., § 581, subds. 3, 4; § 582, based on Practice Act, §§ 148, 149.

16. See infra, § 22.

17. See supra, § 12.

18. See infra, § 28.

19. Overaa v. Keeney, 169 Cal. 628, 147 Pac. 466; Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002 (dismissal after demurrer but before answer filed).

20. See infra, this section.

1. San Jose Land & Water Co. v. Allen, 129 Cal. 247, 61 Pac. 1083. (The fact that shortly before the motion to dismiss, the court granted the plaintiff leave to amend, does not preclude it from dismissing the action.)

2. Saville v. Frisbie, 70 Cal. 87, 11 Pac. 502.

3. Chipman v. Hibbard, 47 Cal. 638.

4. Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002; Mowry v.

even after the submission of the demurrer for decision, to take such steps as may reasonably be necessary to make it possible for a decision to be rendered where, to his knowledge, something has intervened to render a decision impossible without action by the parties. Such is the case where the records are destroyed in a great conflagration, and the plaintiff knows a restoration of the records is a prerequisite to a decision.[5] A different situation is presented where the intervening event rendering a decision impossible is unknown to the plaintiff. In that case he has fully discharged his duty in diligently pressing the matter to hearing and submission by the court.[6]

What actions.—A court may not only dismiss for want of prosecution an action instituted by a state officer in his own name for the benefit of private parties,[7] but it may also dismiss an action instituted by the state in its sovereign capacity for the assertion of a public right or protecting a public interest.[8]

Weisenborn, 137 Cal. 110, 69 Pac. 971; People v. Jefferds, 126 Cal. 296, 58 Pac. 704; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57 (delay of three years in bringing demurrer on to hearing); Barton v. Richmond, 39 Cal. App. 564, 179 Pac. 522 (holding the court did not abuse its discretion in granting a dismissal where more than five years elapsed between the filing of the demurrer and the order of dismissal). See Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326, holding that a defendant has not an absolute right to have his motion to dismiss considered before the demurrer. His application is addressed to the discretion of the court who may consider whether the plaintiff is at the time seeking a disposal of the demurrer.

5. Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481 (holding a dismissal was properly granted where the cause had been submitted on demurrer at the time of the San Francisco earthquake and fire, and where the plaintiff was guilty of delay in restoring the records).

6. Raggio v. Southern Pacific Co., 181 Cal. 472, 185 Pac. 171 (where after the submission of the case the judge retired from the bench).

7. Anderson v. Nawa, 25 Cal. App. 151, 143 Pac. 555 (dismissing for want of prosecution an action by a bank commissioner against the stockholders of an insolvent bank for the benefit of its creditors).

8. People v. Kings County Development Co., 32 Cal. App. Dec. 477, 191 Pac. 1004, holding Code Civ. Proc., § 581a, is applicable to actions instituted by the state.

§ 19. Motion to Dismiss.—When a dismissal for want of prosecution rests in the discretion of the court a motion therefor should be made on notice to the plaintiff so that he may present facts rebutting laches.[9] It is not necessary, however, to serve the remaining parties.[10] In cases falling within sections 581a or 583 of the Code of Civil Procedure it is provided that the action "must be dismissed by the court . . . on its own motion"; and the court can take such action without notice to either of the parties,[11] but it has been suggested that such orders should not be granted upon ex parte application in any but the plainest and most certain of cases.[12] A motion to dismiss because of delay in issuing or serving summons may be made without entering an appearance in the action.[13]

§ 20. Hearing.—No fixed or certain rule can be laid down as to the circumstances which will justify a court in exercising its discretion in dismissing an action on the ground of want of prosecution, for the obvious reason that no two cases present precisely the same facts. The exercise of this power must in the very nature of things be left to the discretion of the nisi prius court, subject only to a reversal for a patent abuse of such discretion.[14] In ruling upon a motion to dismiss for want of prosecution a

9. Poole v. Caulfield, 45 Cal. 107; Saville v. Frisbie, 2 Cal. Unrep. 181.

10. Estate of Hite, 155 Cal. 390, 101 Pac. 8 (citing Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183; White v. Superior Court, 126 Cal. 245, 58 Pac. 450; Siskiyou County Bank v. Hoyt, 132 Cal. 81, 64 Pac. 118; Grant v. McArthur, 137 Cal. 270, 70 Pac. 88; and Swortfiguer v. White, 141 Cal. 576, 75 Pac. 172).

11. Ransome-Crummey Co. v. Wood, 40 Cal. App. 355, 180 Pac. 951. See infra, §§ 22, 26.

12. Consolidated Construction Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 Pac. 238.

13. Eldridge v. Kay, 45 Cal. 49.

14. Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183; First National Bank v. Nason, 115 Cal. 626, 47 Pac. 595; Caldwell v. Regents of University of California, 23 Cal. App. 29, 136 Pac. 731; Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658. See Appeal and Error, vol. 2, p. 902, as to review of discretion upon appeal.

court will not consider the merits of the action,[15] but it may properly consider any facts appearing in the record of the case and bearing upon the question of diligence and good faith, whether they occurred before the action was begun or afterwards.[16] The court will properly refuse to dismiss where the delay has been at the request of the defendant.[17] The fact that counsel for the plaintiff has other matters to which he prefers to give professional attention is a circumstance to be considered by the judge although it will not necessarily excuse delay.[18] The following facts, however, have been held insufficient to excuse delay in prosecuting an action: the death of one of plaintiff's attorneys, there being no showing that there were no other attorneys accessible,[19] the fact that counsel desired to have the advice of the decision on an appeal in another case then pending in an appellate court,[20] and the fact that the defendant threatened to take advantage of the insolvent laws.[1] So also illness of the judge of the department to which the action was assigned will not excuse a delay, where the matter can as well be heard by the judge of another department.[2] Whether or not a defendant suffered any material inconvenience or hardship by reason of the delay is not a matter for consideration upon the hearing of the motion, as the law will presume

15. Bell v. Solomons, 162 Cal. 105, 121 Pac. 377; Anderson v. Nawa, 25 Cal. App. 151, 143 Pac. 555.

16. People's Home Sav. Bank v. Sherman, 150 Cal. 793, 90 Pac. 133.

17. First National Bank v. Nason, 115 Cal. 626, 47 Pac. 595; Cowell v. Stuart, 69 Cal. 525, 11 Pac. 57. See Hassey v. South San Francisco Homestead etc. Assn., 102 Cal. 611, 36 Pac. 945, holding that under the circumstances a dismissal was proper where a portion of the delay was at the request of the defendant. See infra, §§ 23, 31, as to rule where dismissal is mandatory.

18. Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481.

19. Watterson v. Hillside Water Co., 42 Cal. App. 364, 183 Pac. 592.

20. People v. Jefferds, 126 Cal. 296, 58 Pac. 704; Simmons v. Keller, 50 Cal. 38; Watterson v. Hillside Water Co., 42 Cal. App. 364, 183 Pac. 592.

1. First National Bank v. Nason, 115 Cal. 626, 47 Pac. 595.

2. Bell v. Solomons, 162 Cal. 105, 121 Pac. 377; Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481.

injury from unreasonable delay.[3] And the fact that the defendant did not protest against the delay is immaterial.[4]

§ 21. Entry and Judgment.—Neither section 581a nor 581b of the Code of Civil Procedure provide just how the dismissals therein provided for are to be made, but the implication is that the dismissals shall be made in the manner provided in section 581 for dismissals by the court, that is to say, they shall, at least, be entered in the minutes,[5] and it has been suggested that possibly they should be entered in the judgment-book.[6] It has been held, however, that the judgment is final for purposes of appeal when entered in the minutes.[7] A dismissal for laches or want of prosecution is not a judgment on the

3. Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481.

4. Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481. Compare Kennedy v. Mulligan, 136 Cal. 556, 69 Pac. 291, where the appellate court in upholding an order refusing to dismiss stated that no injury appears to have resulted to the defendant.

5. Consolidated Const. Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 Pac. 238. As to entry under section 581 of the Code of Civil Procedure, see infra, § 40.

6. "By very analogy . . . it should be the rule that orders of dismissal under sections 581a and 581b should, like similar orders under section 581, be at least entered in the minutes, in order that they be finally effective and constitute judgments. In fact, strong reasons may be urged why the effective character which an order of dismissal under section 581 assumes, upon its mere entry in the minutes is an exception to the general rule that judgments must be entered in the judgment-book before they become effective as judgments (sections 664 and 668, Code Civ. Proc.), and that the exception should not be extended beyond the particular case provided for by the statute. If this be the true rule, then judgment must be entered in the judgment-book, in order that the order of dismissal under sections 581a or 581b be finally effective." Consolidated Const. Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 Pac. 238, per Olney, J. See Darlington v. Butler, 3 Cal. App. 448, 86 Pac. 194, holding that a judgment of dismissal became effective and final when the court rendered its decision dismissing the action in open court, and it was entered in the minute-book and in the judgment-book by the clerk, although it was not signed by the judge. The court said, however, that "the order entered in the minute-book was in effect the final judgment of dismissal."

7. See Appeal and Error, vol. 2, p. 159, note 7.

merits but a refusal to hear and determine upon the merits.[8]

Vacation of.—When a dismissal of an action for want of prosecution rests in the discretion of a court, the court, under section 473 of the Code of Civil Procedure, is authorized to relieve the plaintiff from the dismissal taken against him through his inadvertence or excusable neglect.[9]

Upon the entry of an order and a judgment of dismissal in accordance with the imperative command of the law, the court loses jurisdiction of the case and cannot thereafter amend its judgment by limiting it to the defendant moving for the dismissal.[10] Yet such a dismissal is within the control of the court prior to the entry of the order in the minutes and perhaps prior to the entry in the judgment-book, and it may be vacated if made inadvertently or through mistake. An application based upon this ground is not governed by section 473 of the Code of Civil Procedure, as the mistake is that of the court. The application therefor may be made ex parte, but by analogy to the rule there laid down, it must be made within six months after the dismissal becomes effective.[11]

Delay in Issuing or Serving Summons.

§ 22. **Statutory Provision.**—Section 581a of the Code of Civil Procedure provides as follows:

"No action . . . shall be further prosecuted, and no further proceedings shall be had therein, and all actions . . .

8. Bell v. Solomons, 162 Cal. 105, 121 Pac. 377, holding that such a judgment is not objectionable as determining the merits because it states that: "It is ordered, adjudged and decreed that plaintiff do take nothing by this action against the defendant, but that judgment of dismissal be and and the same is hereby entered herein."

9. Moore v. Thompson, 138 Cal. 23, 70 Pac. 930.

10. Swortfiguer v. White, 141 Cal. 576, 75 Pac. 172.

11. Consolidated Const. Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 Pac. 238, holding the dismissal may be vacated on the ground of a mistake of the court in supposing that a summons had not been issued within one year when a summons had in fact been issued.

must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the state, or while he has secreted himself within the state to prevent the service of summons on him."[12]

This section in substantially its present form was formerly embraced in section 581 of the same code under subdivision 7 thereof, adopted in 1889, but was made a separate section in 1907. It is not applicable to actions brought in the justices' courts.[13]

§ 23. **Mandatory Duty to Dismiss.**—The effect of section 581a of the Code of Civil Procedure is to confer upon the trial court power to dismiss an action on its own motion,[14] or upon the motion of an interested person not named as a party,[15] and to make it mandatory upon the

12. See Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080 (holding the amendment of 1895 did not change the force of the statute in any way, but merely removed an ambiguity therein); Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470 (holding the statute is not unconstitutional so far as it is made applicable to pending suits). See supra, § 21, as to entry of dismissal.

13. Hubbard v. Superior Court, 9 Cal. App. 166, 98 Pac. 394.

14. Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125; Darlington v. Butler, 3 Cal. App. 448, 86 Pac. 194.

15. Prior to the adoption of this section it was held that a stranger to the proceedings affecting title to real estate could not move to dismiss an action, although he was

court to dismiss an action where the summons has not been served within one year, or served and returned within three years.[16] When the delay equals that prescribed by the statute, the court loses jurisdiction of the action and can proceed no further therein, except to dismiss the action, and prohibition will lie to prevent it from taking any other course.[17] The only exceptions to this rule are in cases where the defendant has made a voluntary appearance within three years,[18] or in cases, other than certain actions relating to real or personal property, in which the defendant is absent from the state or has secreted himself to avoid service.[19] The action must be dismissed, although the summons was actually served

an owner of land embraced within the tract sued for. Soule v. Billings, 42 Cal. 285. Consequently such suits could not be disposed of in case of death or removal of parties, as there was no one entitled to give or receive notice. It was to meet this objection that this amendment was passed by the legislature. Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125. See Amicus Curiae, vol. 1, p. 1094, as to right of amicus curiae to move for a dismissal.

16. Hibernia Sav. & Loan Soc. v. Cochran, 141 Cal. 653, 75 Pac. 315; Grant v. McArthur, 137 Cal. 270, 70 Pac. 88; Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080; Davis v. Hart, 123 Cal. 384, 55 Pac. 1060; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470; Fanning v. Foley, 99 Cal. 336, 33 Pac. 1098; People v. Kings County Development Co., 32 Cal. App. Dec. 477, 191 Pac. 1004; Boyer v. Long Beach, 32 Cal. App. Dec. 301, 191 Pac. 35 (holding a notice of substitution of attorneys, not treated as an appearance by either party, did not prevent a dismissal of the action); Ransome-Crummey Co. v. Wood, 40 Cal. App. 355, 180 Pac. 951 (holding that the statute applies to actions under the Vrooman Act); Bellingham Bay Lumber Co. v. Western Amusement Co., 35 Cal. App. 515, 170 Pac. 632; McColgan v. Piercy, 17 Cal. App. 160, 118 Pac. 957.

17. Modoc Land & Livestock Co. v. Superior Court, 128 Cal. 255, 60 Pac. 848; White v. Superior Court, 126 Cal. 245, 58 Pac. 450, granting a writ of prohibition to prevent the issuance of an alias summons.

18. See Appearance, vol. 3, p. 6. As to what constitutes an appearance within the meaning of the rule, see Appearance, vol. 3, p. 9, and p. 19, notes 10 and 11. As to presumption of power of attorney to appear in such case, see Attorneys at Law, vol. 3, p. 648, note 19.

19. Wilson v. Leo, 19 Cal. App. 793, 127 Pac. 1043, holding that a finding that the defendant did not secrete himself is conclusive upon an appellate court where the evidence is conflicting.

within three years if a return is not made within that time,[20] provided the action has not already gone to judgment.[1] But it is not necessary that the summons be both issued and served within a year.[2] A summons is issued within the rule when the clerk has done all the acts prescribed by statute for the issuing of the writ,—that is to say, when he has signed and authenticated the writ in the manner set forth. Consequently, an action will not be dismissed merely because the summons is not placed in the hands of an officer for service within a year.[3]

The right to a dismissal under this section is not affected by the following: by the fact that the plaintiff after the three years had the summons served upon defendant and had a default entered,[4] by the substitution as plaintiff, after the lapse of three years, of the assignee of the plaintiff's interest in the subject of the action,[5] or by the death of the defendant before the expiration of the three years.[6] Nor is the running of the statute prevented by the ignorance of the creditor of the residence of the debtor, or of the fact that he has property which can be reached.[7] So also the loss for a time of the summons does not extend the statutory period, the remedy for such loss being provided for in section 1045 of the Code of Civil Procedure.[8]

20. Grant v. McArthur, 137 Cal. 270, 70 Pac. 88; Modoc Land & Livestock Co. v. Superior Court, 128 Cal. 255, 60 Pac. 848.

1. Jones v. Gunn, 149 Cal. 687, 87 Pac. 577.

2. Murray v. Gleeson, 100 Cal. 511, 35 Pac. 88, construing the provision as it stood before the amendment of 1895. Immediately after this decision the section was amended so as to remove any ambiguity in this respect. See supra, § 22, where the statute is quoted.

3. Perris Irr. Dist. v. Turnbull, 215 Fed. 562, 132 C. C. A. 74.

4. Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080.

5. Swortfiguer v. White, 141 Cal. 576, 75 Pac. 172.

6. Davis v. Hart, 123 Cal. 384, 55 Pac. 1060, distinguished in Union Sav. Bank v. Barrett, 132 Cal. 453, 64 Pac. 713, 1071, on the ground that the personal representative in the latter case appeared in the action within three years and thus obviated service of summons.

7. Davis v. Hart, 123 Cal. 384, 55 Pac. 1060.

8. Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

It has been held that the action must be dismissed even though the delay was at the request and for the benefit of the defendant.[9]

§ 24. Discretionary Power to Dismiss.—Prior to the adoption of what is now section 581a of the Code of Civil Procedure, it was well settled that it was within the discretion of a trial court to dismiss an action for unreasonable delay in issuing or serving summons, no matter how long the delay.[10] While it is now compulsory upon the court to dismiss an action when the delay equals the statutory period,[11] there is no apparent purpose to regulate the exercise of the court's power in other cases, and its power continues unimpaired when the delay is for a period shorter than that named in the statute.[12] So also there

9. Siskiyou County Bank v. Hoyt, 132 Cal. 81, 64 Pac. 118; White v. Superior Court, 126 Cal. 245, 58 Pac. 450; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470. See infra, § 29.

10. McDonald v. Swett, 76 Cal. 257, 18 Pac. 324 (holding it was not an abuse of discretion to refuse a dismissal under the facts of the case); Cowell v. Stuart, 69 Cal. 525, 11 Pac. 57; Linden Gravel Min. Co. v. Sheplar, 53 Cal. 245 (delay of one year in issuing summons); Carpentier v. Minturn, 39 Cal. 450 (a delay of eight years); Clark v. Smith, 63 Cal. 385 (holding the discretion of the court in denying the motion on condition that plaintiff waive his right to a deficiency judgment was not abused under the circumstances); Lander v. Flemming, 47 Cal. 614 (delay of two years and two months in serving summons); Eldridge v. Kay, 45 Cal. 49 (delay of three years after complaint filed in serving summons); Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213 (delay of two years and eight months in serving summons); Reynolds v. Page, 35 Cal. 296; Dupuy v. Shear, 29 Cal. 238 (a delay of nine years in serving summons).

11. See supra, § 23.

12. Mori v. Mori, 171 Cal. 79, 151 Pac. 1136; Marks v. Keenan, 148 Cal. 161, 82 Pac. 772 (holding a delay of one year and four months in serving summons is ground for dismissal where the defendant resided in the city where the action was brought, and his place of residence was stated in the city directory); Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037; Kennedy v. Mulligan, 136 Cal. 556, 69 Pac. 291 (holding the court did not abuse its discretion in denying a motion to dismiss); Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183 (a delay of three years after the filing of the complaint in serving summons); Murray v. Gleeson, 100 Cal. 511, 35 Pac. 88; Castro v. San Francisco, 4 Cal. Unrep. 500, 35 Pac. 1035

can be no doubt but that a court may dismiss an action as to one of several defendants where there is an unreasonable delay in serving him.[13]

Summons upon cross-complaint.—Section 581a of the Code of Civil Procedure does not apply to the issuance, service and return of summons upon a cross-complaint because it was enacted before the law required summons in such cases. But the court has inherent power to dismiss for lack of diligence in the prosecution of a cross-complaint.[14]

§ 25. Circumstances Affecting Exercise of Discretion.—There is no fixed rule as to what delay short of that specified in the statute will warrant a dismissal for delay in issuing or serving summons.[15] When the defendant has made a prima facie showing of unreasonable delay in issuing or serving summons, it is the duty of the plaintiff to show circumstances excusing his tardiness.[16] For example, he may show that the parties were attempting to compromise the case and that to serve the summons pend-

(delay of two years in serving summons); Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125 (delay of two years in serving summons); Diggins v. Thornton, 96 Cal. 417, 31 Pac. 289 (delay of nine years in serving summons); Castro v. San Francisco, 4 Cal. Unrep. 500, 35 Pac. 1035 (delay of two years in serving summons); Watterson v. Hillside Water Co., 42 Cal. App. 364, 183 Pac. 592 (delay of two years); Anderson v. Nawa, 25 Cal. App. 801, 143 Pac. 558; Anderson v. Nawa, 25 Cal. App. 151, 143 Pac. 555 (a delay of two years and ten months in making service); Caldwell v. Regents, 23 Cal. App. 29, 136 Pac. 731; Meyers v. Parmelee (Cal. App.), 92 Pac. 662; Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658 (delay of four months in serving summons in an action to determine an adverse claim to mineral land).

13. Wisnom v. McCarthy, 32 Cal. App. Dec. 973, 192 Pac. 337.

14. Seaman v. Superior Court, 183 Cal. 47, 190 Pac. 441.

15. See supra, § 20.

16. Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037. See Pacific Bridge Co. v. Jacobus, 2 Cal. Unrep. 749, 13 Pac. 493, holding there is no abuse of discretion in dismissing a case where certain persons represented that the defendant would abide the event of a test case, but the defendant denied their authority to make the representations.

ing the negotiations would embarrass the settlement.[17] But a delay is not sufficiently excused where it is caused by a showing of a mistake of counsel in believing he had the full time specified in section 581a of the Code of Civil Procedure in which to issue and serve process,[18] or by the fact that the papers were mislaid and forgotten,[19] or by the fact that a criminal proceeding against the defendant was pending,[20] or by the mere fact that the delay did not operate to deprive a defendant of any defense he may have.[1] Nor will the fact that the plaintiff was occupied during the entire period of the delay in procuring evidence of the defendant's liability excuse a delay in serving summons, although it would undoubtedly furnish good ground for a postponement of the trial after issue joined.[2] So also a difficulty in ascertaining the whereabouts of some of the defendants will not excuse a failure to serve those whose whereabouts are known, when the defendants are severally liable and a several judgment might be rendered against any of them without regard to the others.[3] The service of summons and entry of default of the defendant after notice is given of a motion to dismiss will not preclude a dismissal of the action as the dismissal relates back to the time of service of the notice of motion.[4]

17. Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037.

18. Watterson v. Hillside Water Co., 42 Cal. App. 364, 183 Pac. 592.

19. Carpentier v. Minturn, 39 Cal. 450.

20. Mori v. Mori, 171 Cal. 79, 151 Pac. 1136.

1. Anderson v. Nawa, 25 Cal. App. 151, 143 Pac. 555.

2. Anderson v. Nawa, 25 Cal. App. 151, 143 Pac. 555 (holding that an action by a bank commissioner against the stockholders of an insolvent bank will be dismissed for delay in serving summons, although during the entire period of delay the plaintiff was conducting an investigation of the bank's assets); Caldwell v. Regents, 23 Cal. App. 29, 136 Pac. 731.

3. Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183; Anderson v. Nawa, 25 Cal. App. 151, 143 Pac. 555.

4. Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213.

Delay in Bringing Action to Trial.

§ 26. In General.—Section 583 of the Code of Civil Procedure, adopted in 1905, reads as follows:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

This section was not repealed by the amendment of section 582 in 1907.[5] It applies only to the instance of delay in bringing a case to trial after the filing of an answer, as distinguished from a demurrer.[6] And a defendant who has not filed an answer cannot avail himself of its provisions.[7] This section applies only to dismissals by the superior court.[8] It authorizes a dismissal of an action "by the court in which the same shall have been commenced or to which it may be transferred." This language, it would seem, is broad enough to include actions transferred to superior courts by an appeal from a judgment in a justice's court. While the contrary has been held, the decision was based upon a misinterpretation of the language of the statute.[9] Aside from this, how-

5. Johnston v. Baker, 167 Cal. 260, 139 Pac. 86.

6. Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002; Barton v. Richmond, 39 Cal. App. 564, 179 Pac. 522. See Dempsey v. Underhill, 156 Cal. 718, 106 Pac. 73, where the court states that it may be seriously questioned whether the court could dismiss the plaintiff's action as to defaulting defendants.

7. Kinard v. Jordan, 175 Cal. 13, 164 Pac. 894.

8. In this respect justices' courts are governed by section 890a, adopted in 1919. See Justices of the Peace.

9. As noted in Los Angeles v. Superior Court, 185 Cal. 405, 197

ever, the superior court has power to dismiss an action in such case by virtue of its inherent powers if there is an unreasonable delay.[10]

§ 27. Delay Less Than Five Years.—Prior to the enactment of section 583 of the Code of Civil Procedure, the courts were vested with discretionary power to dismiss an action for want of prosecution at any time, notwithstanding an answer had been filed.[11] Section 583 does not in terms prohibit a court from ordering a dismissal prior to the expiration of two years after answer filed; yet that is a necessary implication from its terms. In other words, this section, while not a restriction upon the power of the court, is a legislative determination that a delay for two years, or less, in bringing the action to trial after answer, is not to be regarded as unreasonable.[12] The cases declaring that section 581a does not affect the exercise of the court's discretion in dismissing are inapplicable to the language of section 583.[13]

Delay exceeding two but less than five years.—The first clause of section 583 of the Code of Civil Procedure provides a discretionary ground of dismissal for want of

Pac. 79, the court in Pistolesi v. Superior Court, 26 Cal. App. 403, 147 Pac. 104, based one of its grounds of decision upon an inadvertent misinterpretation of the provision that the action shall be dismissed "by the court . . . to which it may be transferred on motion of the defendant." The words "on motion of the defendant" were misapplied as referring to a transfer from one court to another on motion of the defendant, whereas the reference is to a dismissal on motion of the defendant, as obviously appears from the context. The case of Long v. Superior Court, 31 Cal. App. 34, 159 Pac. 734, follows the Pistolesi case.

10. Kaster v. Superior Court, 34 Cal. App. 88, 166 Pac. 852; Pistolesi v. Superior Court, 26 Cal. App. 403, 147 Pac. 104. See supra, § 18.

11. Nicol v. San Francisco, 130 Cal. 288, 62 Pac. 513; Davis v. Clark, 126 Cal. 232, 58 Pac. 542 (where there was a delay of five years); Simmons v. Keller, 50 Cal. 38.

12. Johnston v. Baker, 167 Cal. 260, 139 Pac. 86; Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002.

13. Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002. See supra, §§ 24, 25.

diligent prosecution of an action after two years and before five years, after answer filed,[14] and the action of the court in granting or refusing to dismiss in such case cannot be controlled by mandamus or certiorari,[15] or upon appeal,[16] at least in the absence of a clear abuse of discretion. This power to dismiss the action is not affected by the loss and destruction or by the restoration of the records of the action.[17] It has been suggested in a late case that the court in exercising its discretion under this clause of section 583, has a right to consider the history of the case prior to the filing of the answer,[18] although this is contrary to some earlier cases.[19] However this may be, the court cannot consider the question whether the plaintiff has a meritorious cause of action,[20] although it has been held that a dismissal should be denied where it clearly appears that the answer was sham and was filed merely for the purpose of delay.[1] Mere negligence of counsel is negligence of the client and will not preclude a dismissal.[2] But other engagements of counsel may excuse a delay.[3]

§ 28. **Delay Exceeding Five Years.**—Unlike the first clause, the second clause of section 583 of the Code of Civil Procedure makes a fixed and arbitrary rule. The trial

14. Andersen v. Superior Court, 187 Cal. 95, 200 Pac. 963; Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002.

15. Andersen v. Superior Court, 187 Cal. 95, 200 Pac. 963.

16. See Appeal and Error, vol. 2, p. 902.

17. Bell v. Solomons, 162 Cal. 105, 121 Pac. 377.

18. Goldman v. Palmtag, 169 Cal. 170, 146 Pac. 429.

19. Johnston v. Baker, 167 Cal. 260, 139 Pac. 86, where the court say: "Moreover, we are of the opinion that by filing their answers respondents waived any laches predicated upon the ground of failure on the part of plaintiffs to prosecute the action prior to the filing of such answers."

20. Bell v. Solomons, 162 Cal. 105, 121 Pac. 377.

1. Merced Bank v. Price, 145 Cal. 436, 78 Pac. 949; Herman v. Pacific Jute Mfg. Co., 131 Cal. 210, 63 Pac. 344.

2. Nicol v. San Francisco, 130 Cal. 288, 62 Pac. 513.

3. Goldman v. Palmtag, 169 Cal. 170, 146 Pac. 429.

court has no discretion to refuse an order of dismissal, where it is made to appear that the action has not been brought to trial within five years after answer filed, and that no stipulation in writing to extend the time has been made. It has been repeatedly held that the requirement that the court dismiss in such case is mandatory,[4] and that mandamus is a proper proceeding to compel a dismissal.[5] While the defendant has a remedy by appealing from any judgment that may be rendered against him,[6] this remedy can scarcely be called speedy and adequate, so as to preclude mandamus.[7] The right of a defendant to a dismissal under this section of the code is not affected by the equities of the case on the merits,[8] or with matters involved, or the time that elapsed prior to the filing of the answer, as the five years does not begin to run until that date.[9]

§ 29. Computation of Statutory Period.—The five-year period for bringing an action to trial, mentioned in section 583 of the Code of Civil Procedure, commences to run with the filing of the answer.[10] And it is not interrupted by the death of the plaintiff, as in that case it is the duty of the personal representatives of his estate to have the pending litigation brought to trial within the statutory period. This rule is not affected by section 353 of the same code, as that section applies only to the time of

4. Andersen v. Superior Court, 187 Cal. 95, 200 Pac. 963; Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 200 Pac. 616; Boyd v. Southern Pac. R. Co., 185 Cal. 344, 197 Pac. 58; Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841; Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002; Ravn v. Planz, 37 Cal. App. 735, 174 Pac. 690; Perrin v. Miller, 35 Cal. App. 129, 169 Pac. 426; Central Pacific R. R. Co. v. Riley, 31 Cal. App. 394, 160 Pac. 844.

5. Andersen v. Superior Court, 187 Cal. 95, 200 Pac. 963. See Mandamus.

6. See Appeal and Error, vol. 2, p. 158.

7. Andersen v. Superior Court, 187 Cal. 95, 200 Pac. 963,

8. Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79.

9. Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79.

10. Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79.

commencing an action after death of the person entitled to sue.[11] Nor is the running of the statutory period affected by the death of plaintiff's attorney. The statute prohibiting proceedings against a party after the death of his attorney until he is given notice to appoint another attorney or appear in person has no application, as the mere running of the five-year period is not a "proceeding" within the meaning of the act.[12] The word "trial" in section 583 refers to a trial of the issues of fact.[13] A case is not "brought to trial" within the meaning of the section where the plaintiff, before the expiration of the five-year period, applies to have the cause set, but the court fixes a date after the prescribed time, especially where the plaintiff fails to call the court's attention to the necessity for an earlier date. The rule might be different, however, where a reasonable time before the running of the five years the plaintiff endeavors to have the cause set for trial but the court refuses to set a date before such time shall have run although its attention is called to the necessity for so doing.[14]

If an erroneous judgment be rendered against the defendant before trial and an appeal is taken therefrom, the appeal suspends all power of the trial court to proceed and necessarily takes the case out of the operation of section 583 while the appeal remains pending. So also a superior court has no authority pending the appeal to vacate the judgment. Consequently an order purporting to vacate the judgment will not set in motion the time prescribed by section 583.[15]

§ 30. Stipulations Extending Time.—As to the effect of stipulations, the statute says that the court must dismiss

11. Andersen v. Superior Court, 187 Cal. 95, 200 Pac. 963. See Limitation of Actions.

12. See Attorneys at Law, vol. 3, p. 632.

13. Perrin v. Miller, 35 Cal. App. 129, 169 Pac. 426.

14. Boyd v. Southern Pacific R. Co., 185 Cal. 344, 197 Pac. 58.

15. Kinard v. Jordan, 175 Cal. 13, 164 Pac. 894. See Appeal and Error, vol. 2, p. 417, as to power of trial court pending appeal.

actions not brought to trial within five years after answer filed, "except where the parties have stipulated in writing that the time may be extended."[16] This provision has been held to mean that a dismissal shall be granted unless an action is brought to trial within the statutory period "except where, pursuant to a stipulation of the parties, a different limit has been fixed."[17] A stipulation in terms waiving the benefit of this section, or one in terms providing that the time fixed by the section within which trial must be had, shall be extended indefinitely or for a definite time, or a series of stipulations continuing the trial to a date beyond the five-year period might any of them suffice as an answer to a motion to dismiss and constitute a stipulation in writing that the time (the five-year period) shall be extended.[18] But no such effect can be given to any extensions made or stipulated as to dates within the statutory period,[19] or to a stipulation requiring a designated notice of the resetting of a case after a continuance.[20] And a stipulation that a case be dropped from the calendar to be reset upon notice is not within the statute.[1] The stipulation must be in writing to be availing to

16. Richmond v. Julian Consolidated Mining Co., 176 Cal. 600, 169 Pac. 356; Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12 (limited by Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79).

17. City of Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79; In Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841, the court, after quoting the statute, states that this language seems to us to say very clearly that "unless the parties have, in effect at least, stipulated in writing that the action need not be brought to trial within five years from the date of the filing of the answer, it must be dismissed at the expiration of such five years, 'if not brought to trial' within that time."

18. Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841; City of Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79.

19. Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 200 Pac. 616; City of Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79; Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841.

20. Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79.

1. Central Pac. R. R. Co. v. Riley, 31 Cal. App. 394, 160 Pac. 844.

the complainant.[2] But a stipulation by counsel is a stipulation by the parties within the meaning of section 583.[3] By entering into a stipulation extending the time for a specified period a defendant does not waive his right to a dismissal under this section for all time, but only for the period covered by the stipulation. This is plainly implied by the statute, although a literal and restricted interpretation of its language might justify a contrary contention.[4]

§ 31. Estoppel or Waiver of Right to Claim Dismissal. It seems to have been intimated in some cases that there may be equitable grounds of estoppel to the enforcement of the dismissal of an action under section 583 of the Code of Civil Procedure.[5] And this would seem to be in harmony with the principle announced in analogous cases.[6] Yet, notwithstanding these intimations it has been held that an action must be dismissed even though the plaintiff has caused an action to be set for trial within the statutory period and it is continued beyond that time on the application of the defendant and without the plaintiff's consent.[7]

2. Perrin v. Miller, 35 Cal. App. 129, 169 Pac. 426.

3. Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841. See Stipulations.

4. Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79.

5. Andersen v. Superior Court, 187 Cal. 95, 200 Pac. 963; Los Angeles v. Superior Court, 185 Cal. 405, 197 Pac. 79 (in this case the court stated that it was questionable whether the stipulation in question was within the exception in Code Civ. Proc., § 583, but it "effected an estoppel upon the defendant to count the period of this continuance as part of the time limit of the code provision"); Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841, where the court say that it is a stipulation in writing extending the five-year period that the statute provides for, and without such a stipulation "certainly in the absence of some element of estoppel," there can be no effective answer to a motion to dismiss.

6. See Criminal Law, vol. 8, p. 202, as to rule with reference to the time when criminal prosecutions must be brought to trial.

7. This holding is based upon a literal interpretation of the statute. Under this holding it is the duty of the plaintiff, when a postponement beyond the statute is sought, to call the court's attention to the consequences which would flow from

The mere lapse of five years before trial does not deprive the court of jurisdiction to try the case, and if the parties appear and voluntarily try the case without objection, it will hardly be disputed that a judgment following such a trial would be valid. And as they can thus waive the right to object, they can also confer jurisdiction by stipulation to submit the cause for trial, made after the expiration of the statutory period.[8] However, when a plaintiff before the expiration of the statutory period moves to have the action set for trial, a mere failure of a defendant to object to setting the cause for trial after that time is not such an acquiescence as will estop him from moving for a dismissal.[9] It seems that the mere fact of the filing of a cross-complaint does not estop a defendant from moving for a dismissal of a case not brought to trial within the statutory period.[10] Certainly it does not have

it, and either secure an earlier date for the trial or a stipulation from opposing counsel waiving the benefit of the statute. Ravn v. Planz, 37 Cal. App. 735, 174 Pac. 690 (overruling Mazitelli v. Crane, 35 Cal. App. 264, 169 Pac. 721).

8. Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 200 Pac. 616, holding that the correspondence between the parties with reference to setting the case for trial after the expiration of the five-year period followed by a signed telegram agreeing upon the date constituted a stipulation within the rule.

9. Boyd v. Southern Pacific R. Co., 185 Cal. 344, 197 Pac. 58.

10. See Kaster v. Superior Court, 34 Cal. App. 88, 166 Pac. 852 (where the court after stating that it is doubtful whether the pleading amounted to a cross-complaint, states: "But granting it to be what is claimed for it, . . . it results that it was the duty of each litigant to promote an early trial and the court could, upon the default of either, dismiss the case"). See, also, Perrin v. Miller, 35 Cal. App. 129, 169 Pac. 426, where a judgment of dismissal was upheld, although the effect of the cross-complaint was not considered. Compare Hickman v. Lynch, 27 Cal. App. 354, 149 Pac. 997, where the court after referring to the fact that the cross-complaint in this case, having been filed at the time the plaintiff moved to have the cause set for trial, was in part the cause of the delay, continues: "But upon the filing of the cross-complaint in the present case the defendants became aggressive and interested actors in the presentation of at least one phase of the case, and therefore they were charged in part with the duty of bringing the case on for trial. (Jacot et al. v. Marks, 26 Misc. Rep. 670, 57 N. Y. Supp. 904.)"

that effect where the cross-complaint is really and substantially purely defensive.[11] But it has been held that where a cross-complaint is filed at the time of plaintiff's application to have the case set for trial and is in part responsible for the delay, the court does not lose jurisdiction to try the case after the expiration of the five-year period.[12]

C. Upon Failure of Proof.

§ 32. In General.—It is provided that a judgment of dismissal or nonsuit may be granted "By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury."[13] The practice herein provided for has received judicial sanction from the earliest date in the history of California.[14] A motion for a nonsuit is tantamount to[15] and accomplishes the same and as the more cumbersome and complicated remedy of demurrer to the evidence, which remedy it has largely superseded.[16] The motion is also similar to a motion for a directed verdict, but there is an important difference between the two as to the effect of the judgments rendered as a bar to a subsequent suit.[17]

A nonsuit for failure of proof may be granted in will contests as well as in ordinary civil actions in the superior courts,[18] but not in actions in justices' courts. Where evidence has been introduced in a trial of a case before a justice and the plaintiff rests his case upon evidence, which to the mind of the justice is insufficient to entitle him to

11. Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841 (distinguishing Hickman v. Lynch, 27 Cal. App. 354, 149 Pac. 997); Kasten v. Superior Court, 34 Cal. App. 88, 166 Pac. 852.

12. Hickman v. Lynch, 27 Cal. App. 354, 149 Pac. 997.

13. Code Civ. Proc., § 581, subd. 5, based on Practice Act, § 148, subd. 5.

14. Mateer v. Brown, 1 Cal. 221; Ringgold v. Haven, 1 Cal. 108.

15. In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787.

16. Ringgold v. Haven, 1 Cal. 108.

17. Estate of Sharon, 179 Cal. 447, 177 Pac. 283, citing cases from other jurisdictions. See Judgment; Trial.

18. Estate of Chevallier, 159 Cal. 161, 113 Pac. 130. See Wills.

judgment, a judgment on the merits for the defendant should be rendered.[19]

§ 33. The Motion.—The law does not authorize a nonsuit upon the failure of plaintiff to prove his case, except upon motion of the defendant,[20] but error in this respect is harmless if the evidence is such that the court would have been compelled to set aside a verdict for the plaintiff.[1] Most, if not all, the considerations requiring a party objecting to the introduction of testimony to state precisely the grounds of his objection are applicable to a motion for nonsuit.[2] It is therefore settled law that a motion for a nonsuit must point the attention of the court and counsel to the precise grounds upon which it is made.[3] It is error to grant a motion when the grounds therefor are not stated,[4] although the error is immaterial if the de-

19. Peacock v. Superior Court, 163 Cal. 701, 126 Pac. 976, overruling Smith v. Superior Court, 2 Cal. App. 529, 84 Pac. 54. See JUSTICES OF THE PEACE.

20. Hancock v. Lopez, 53 Cal. 362; Saul v. Moscone, 16 Cal. App. 506, 118 Pac. 452 (holding that a judgment of dismissal, which is not granted upon motion of the defendant is a final judgment and must be supported by findings of fact.

1. Estate of Higgins, 156 Cal. 257, 104 Pac. 6.

2. People v. Banvard, 27 Cal. 470.

3. Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443; Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394; Brown v. Sterling Furniture Co., 175 Cal. 563, 163 Pac. 322; Durfee v. Seale, 139 Cal. 603, 73 Pac. 435; Palmer v. Marysville Democrat Publishing Co., 90 Cal. 168, 27 Pac. 21; Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Shain v. Forbes, 82 Cal. 577, 23 Pac. 198; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Loring v. Stuart, 79 Cal. 200, 21 Pac. 651; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Coffey v. Greenfield, 62 Cal. 602; Poehlmann v. Kennedy, 48 Cal. 201; Sanchez v. Neary, 41 Cal. 485; People v. Banvard, 27 Cal. 470; McGarrity v. Byington, 12 Cal. 426; Kiler v. Kimbal, 10 Cal. 267; Lally v. Kuster, 32 Cal. App. Dec. 697, 192 Pac. 78; Giles v. Reed, 44 Cal. App. 367, 186 Pac. 614; In re Soale, 31 Cal. App. 144, 159 Pac. 1065; Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; Olson-Mahoney Lumber Co. v. Maxwell, 18 Cal. App. 668, 124 Pac. 100; Christenson Lumber Co. v. Buckley, 17 Cal. App. 37, 118 Pac. 466; Johnson v. Center, 4 Cal. App. 616, 88 Pac. 727. See APPEAL AND ERROR, vol. 2, p. 276.

4. Kiler v. Kimbal, 10 Cal. 267; Christenson Lumber Co. v. Buckley, 17 Cal. App. 37, 118 Pac. 466. See cases cited in next note preceding.

fects are such that they cannot be corrected even if specifically pointed out.[5] So also if particular grounds are stated, the motion will be overruled if they are not tenable, notwithstanding there may have been other good and sufficient reasons for granting a nonsuit.[6] And where a complaint states several causes of action and the motion is directed to all of them, the motion is not tenable unless, as to all, there is a failure of proof.[7] When specifying the grounds of the motion it is not sufficient to state generally that there is no evidence before the court justifying it in granting any relief to the plaintiff,[8] or that plaintiff has failed to prove a sufficient case.[9] The motion should show wherein the plaintiff failed to prove its case or why he is not entitled to recover.[10]

5. Johnson v. Southern California Edison Co., 27 Cal. App. 425, 150 Pac. 656. See Appeal and Error, vol. 2, p. 278.

6. Moore v. Moffatt, 63 Cal. Dec. 101, 204 Pac. 220; Flynn v. Dougherty, 91 Cal. 669, 14 L. R. A. 230, 27 Pac. 1080; Palmer v. Marysville Democrat Publishing Co., 90 Cal. 168, 27 Pac. 21; Shain v. Forbes, 82 Cal. 577, 23 Pac. 198; Belcher v. Murphy, 81 Cal. 39, 22 Pac. 264; Gardiner v. Schmaelzle, 47 Cal. 588; Raimond v. Eldridge, 43 Cal. 506; Moore v. Murdock, 26 Cal. 514; Baker v. Joseph, 16 Cal. 173; Mateer v. Brown, 1 Cal. 221; Bush v. Weed Lumber Co., 36 Cal. App. Dec. 951, 204 Pac. 24; Ross v. Tabor, 35 Cal. App. Dec. 726, 200 Pac. 971; Potts v. Mehrmann, 34 Cal. App. Dec. 106, 195 Pac. 941; Sebring v. Harris, 20 Cal. App. 56, 128 Pac. 7; Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459; De Leonis v. Hammel, 1 Cal. App. 390, 82 Pac. 349. See Appeal and Error, vol. 2, p. 276.

7. Pacific Vinegar & Pickle Works v. Smith, 152 Cal. 507, 93 Pac. 85.

8. Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394.

9. Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Coffey v. Greenfield, 62 Cal. 602; Security Inv. Co. v. Bartram, 36 Cal. App. Dec. 399, 202 Pac. 337; Giles v. Reed, 44 Cal. App. 367, 186 Pac. 614; Williamson v. Williamson, 41 Cal. App. 721, 183 Pac. 301; Coghlan v. Quartarara, 15 Cal. App. 662, 115 Pac. 664.

10. Lake v. O'Brien, 36 Cal. App. Dec. 403, 202 Pac. 158 (ground of motion held to have been sufficiently stated); Griswold v. Pacific Electric Ry. Co., 45 Cal. App. 81, 187 Pac. 65 (holding, in a personal injury suit, that the motion was sufficient under the rule where it was stated that "the uncontradicted evidence shows contributory negligence on the part of the plaintiff that contributed proximately to the injury"); Williamson v. Williamson, 41 Cal. App. 721, 183 Pac. 301.

§ 34. Time of Motion.—A nonsuit may be granted upon a plaintiff's opening statement when it is clear that he has undertaken to state all the facts which he expects to prove, and it is plainly evident that the facts proved will not constitute a cause of action.[11] This practice, however, is a dangerous one and can be upheld only in the case stated.[12] A nonsuit may also be granted in a proper case at the close of the plaintiff's evidence, or at the close of all the evidence.[13] To grant a nonsuit in the latter case is not a violation of the constitutional right of trial by jury,[14] as the action of the court is a decision upon a question of law, and such decisions are within the exclusive province of the court. If a motion for a nonsuit made at the close of the plaintiff's evidence is denied it may be renewed at the close of all the testimony.[15] It has been suggested, however, that the practice of moving for a nonsuit after the defendant's evidence is in should rarely be resorted to, especially when the plaintiff has introduced evidence to sustain the allegations of his complaint.[16] Except when a motion for nonsuit is made upon the opening statement, a motion is premature if made before the close of the plaintiff's case. But any error in entertaining it at such time is harmless, when upon the plaintiff's own testimony it appears that he is not entitled to recover, whatever further evidence might be introduced.[17]

11. Bias v. Reed, 169 Cal. 33, 145 Pac. 516; Emmerson v. Weeks, 58 Cal. 382; Raimond v. Eldridge, 42 Cal. 506. See Estate of McNeil, 155 Cal. 333, 100 Pac. 1086, upholding an order nonsuiting a petitioner for letters of administration upon the opening statement of counsel.

12. Emmerson v. Weeks, 58 Cal. 382.

13. Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Geary v. Simmons, 39 Cal. 224; Ringgold v. Haven, 1 Cal. 108; King v. Hercules Powder Co., 39 Cal. App. 223, 178 Pac. 531.

14. Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 622, 91 Pac. 115.

15. Fagundes v. Central Pac. R. R. Co., 79 Cal. 97, 3 L. R. A. 824, 21 Pac. 437.

16. Vanderford, v. Foster, 65 Cal. 49, 2 Pac. 736.

17. Skelton v. Schacht Motor Car Co., 22 Cal. App. 144, 133 Pac. 504. See Vincent v. Pacific Grove, 102 Cal. 405, 36 Pac. 773, applying the rule when the case was submitted on

§ 35. Hearing of Motion.—A motion for a nonsuit involves the legal effect of admitted facts.[18] When made at the close of plaintiff's case it in purpose and effect operates as a demurrer to the evidence, and must therefore assume that all the evidence in favor of the plaintiff, if relevant to the issues, is true.[19] It is, therefore, well settled that upon a motion for nonsuit, particularly when made at the close of plaintiff's case, all the evidence must be construed most strongly against the defendant.[20] Every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence produced must be considered as facts in favor of the plaintiff.[1] If the evidence is fairly susceptible of two con-

briefs and the court granted a nonsuit before the expiration of the time for filing a reply brief.

18. Smith v. Superior Court, 2 Cal. App. 529, 84 Pac. 54.

19. Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108; In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787; Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709; Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723. "It is clear that it makes no difference, where the motion for a nonsuit is made on the close of plaintiff's case, whether the court itself believes the testimony or not, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purpose of the motion, just the same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading." Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709, quoted in Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426; In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787. See Warner v. Darrow, 91 Cal. 309, 27 Pac. 737, to the same effect.

20. Gates v. Pendleton, 184 Cal. 797, 195 Pac. 664; Anderson v. Wickliffe, 178 Cal. 120, 172 Pac. 381; Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946; Estate of MacCrellish, 167 Cal. 711, L. R. A. 1915A, 443, 141 Pac. 257; Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; Langan v. Mariposa Commercial etc. Co., 39 Cal. App. 71, 178 Pac. 166; Keifer v. Myers, 5 Cal. App. 668, 91 Pac. 163; Doyle v. Eschen, 5 Cal. App. 55, 89 Pac. 836. See cases cited infra this section.

1. Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946; Lassen v. Southern Pac. Co., 173 Cal. 71, 159 Pac. 143; Lupton v. Domestic Utilities Mfg. Co., 173 Cal. 415, 160 Pac. 241; O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674; Estate of Packer, 164 Cal. 525, 129 Pac. 778; Bush v. Weed Lumber Co., 36 Cal. App. Dec. 951, 204 Pac. 24; In re Little's Estate, 46 Cal. App. 776, 189 Pac. 818 (The court must indulge every "legitimate inference" which may be drawn from the evi-

structions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff.[2] All the evidence in favor of the plaintiff must be taken as true, and if contradictory evidence has been given it must be disregarded.[3] On such motion the

dence. "By 'legitimate inferences' are meant those inferences that necessarily follow from certain evidence—legal inferences that are reasonably and legally to be drawn from the evidence"); Butler v. Solano Land Co., 46 Cal. App. 171, 188 Pac. 1019 ("All presumptions are in favor of the plaintiff upon a motion for a nonsuit"). And see cases cited infra this section.

2. Globe Grain & Milling Co. v. Drenth, 36 Cal. App. 156, 171 Pac. 821. See also cases cited in next note following.

3. McKay v. McKay, 184 Cal. 742, 195 Pac. 385; Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 Pac. 388; Stieglitz v. Settle, 175 Cal. 131, 165 Pac. 436; In re Ross' Estate, 173 Cal. 178, 159 Pac. 603; Wheatley v. Consolidated Lumber Co., 167 Cal. 441, 139 Pac. 1057 (motion made at conclusion of all the evidence); Davis v. Crump, 162 Cal. 513, 123 Pac. 294; Estate of Ricks, 160 Cal. 450, 117 Pac. 532 (will contest); Hoff v. Los Angeles Pacific Co., 15 Cal. 596, 112 Pac. 53; Estate of Arnold, 147 Cal. 583, 82 Pac. 252 (The rule applies to will contests as well as other civil actions); Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Hanley v. California Bridge & Const. Co., 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 577; Goldstone v. Merchants' Ice & C. S. Co., 123 Cal. 625, 56 Pac. 776; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Ross v. Tabor, 35 Cal. App. Dec. 726, 200 Pac. 971; Kleist v. Priem, 34 Cal. App. Dec. 263, 196 Pac. 72; Potts v. Mehrmann, 34 Cal. App. Dec. 106, 195 Pac. 941; Wilson v. Southern Pacific Land Co., 46 Cal. App. 738, 189 Pac. 1040; In re Little's Estate, 46 Cal. App. 776, 189 Pac. 818; In re Campbell's Estate, 46 Cal. App. 612, 189 Pac. 812; Jones v. Mayden, 32 Cal. App. 23, 161 Pac. 1000; Teats v. Caldwell, 28 Cal. App. 206, 151 Pac. 973; Estate of Hodgdon, 23 Cal. App. 415, 138 Pac. 111; Hill v. Pacific Gas & Elec. Co., 22 Cal. App. 788, 136 Pac. 492; Gardstrom v. L. E. White Lumber Co., 21 Cal. App. 744, 132 Pac. 842; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914; Lininger v. San Francisco etc., R. R. Co., 18 Cal. App. 411, 123 Pac. 235; Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426; Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340; In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787; Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 749, 108 Pac. 717; Paolini v. Fresno Canal & Irr. Co., 9 Cal. App. 1, 97 Pac. 1130; Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709; Non-Refillable Bottle Co. v. Robertson, 8 Cal. App. 103, 96 Pac. 324; Estate of Welch, 6 Cal. App. 44, 91 Pac. 336; Hercules Oil Refining Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341; Fish v. Correll, 4 Cal. App. 521, 88 Pac. 489; Anderson v. Bank of Santa Cruz County, 4 Cal. App. 427, 88 Pac. 379; Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606,

court has nothing to do with the question of the credibility of the witnesses,[4] nor with testimony tending to create a conflict.[5] It has nothing to do with any apparent disagreement as to the facts among plaintiff's witnesses,[6] nor with any conflicts between the evidence brought out on direct and cross-examination.[7] The evidence of the plaintiff which is relevant to the issues is to be given its full probative strength, whether or not it has been erroneously admitted.[8] But matters alleged in the answer by way of defense cannot be considered on the hearing of the motion, where no evidence is offered in support thereof.[9]

These rules are somewhat different where the motion is made after the testimony for both sides has been put in,—that is to say, it is a well-established rule that a court

86 Pac. 738, 903; Wagner v. Wedell, 3 Cal. App. 274, 85 Pac. 126. See Gaschlin v. Sierra, 32 Cal. App. Dec. 462, 191 Pac. 550, where the court say that while it is the rule, that upon the motion every fair intendment that can be drawn from the plaintiff's case is to be indulged in his favor, this does not mean "that the trial court, in passing upon a motion for nonsuit, must surrender its right to estimate the weight and sufficiency of the evidence taken as a whole, or to determine whether, giving to such evidence such fair and reasonable intendment, it is sufficient to support the plaintiff's case." See Appeal and Error, vol. 2, p. 865, as to corresponding rule upon appeal.

4. Leitch v. Marx, 21 Cal. App. 208, 131 Pac. 328; Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

5. Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 Pac. 388; Fisk v. Poplin, 46 Cal. App. 587, 189 Pac. 722; Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

6. Wassermann v. Sloss, 117 Cal. 425, 59 Am. St. Rep. 209, 38 L. R. A. 176, 49 Pac. 566; Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

7. In re Ross' Estate, 173 Cal. 178, 159 Pac. 603; Burns v. Jackson, 35 Cal. App. Dec. 514, 200 Pac. 80; Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426.

8. Estate of Arnold, 147 Cal. 583, 82 Pac. 252; O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939; Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Mateer v. Brown, 1 Cal. 221; Kleist v. Priem, 34 Cal. App. Dec. 263, 196 Pac. 72; Leitch v. Marx, 21 Cal. App. 208, 131 Pac. 328; Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426; In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787; Non-Refillable Bottle Co. v. Robertson, 8 Cal. App. 103, 96 Pac. 324; Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723.

9. Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834.

may in its discretion grant a motion made at that time where upon all the evidence it would be the duty of the court to set aside a verdict against the defendant.[10]

Where case is tried without jury.—The rules as to nonsuit are the same whether the trial is by the court or by a jury.[11] And when a motion is submitted to a court, acting also as a jury, it is not for the court to base its determination of the motion upon what it might do in dealing with the facts as a jury, but solely upon the proposition of whether the facts as proved make out a prima facie case.[12]

Where motion is made on opening statement.—As in the case of a motion for nonsuit after the introduction of evidence, upon a motion upon the opening statement every fact which counsel has stated as among matters to be proved, together with all favorable inferences reasonably to be drawn therefrom must be accepted by the court as facts which would have been proved if the case had been allowed to be tried, and if those facts entitle the plaintiff to relief, and there is no admission that matters set up by way of defense are true, it would be error to order a nonsuit.[13]

§ 36. Determination of Motion Made at Close of Plaintiff's Case.—A motion for a nonsuit presents for determination a question of law,[14] and it is well settled that

10. Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709; see infra, § 38.

11. Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 Pac. 172; Goldstone v. Merchants Ice etc., Co., 123 Cal. 625, 56 Pac. 776; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914; Hercules Oil Refining Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341; Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723.

12. Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723.

13. Green v. Duvergey, 146 Cal. 379, 80 Pac. 234.

14. Southern Pac. Land Co. v. Dickerson, 63 Cal. Dec. 179, 204 Pac. 576; Perera v. Panama-Pacific I. E. Co., 179 Cal. 63, 175 Pac. 454; Craig v. Hesperia L. & W. Co., 107 Cal. 675, 40 Pac. 1057; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Donahue v. Gallavan, 43 Cal. 573;

a superior court may grant such a motion at the close of plaintiff's evidence, when the evidence presents a question of law.[15]

Langan v. Mariposa Commercial & M. Co., 39 Cal. App. 71, 178 Pac. 166; Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426; In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787; Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709. See Appeal and Error, vol. 2, p. 917.

15. See the following cases where the evidence was held sufficient to justify the overruling of a motion for nonsuit: Scheuermann v. Kuetemeyer, 186 Cal. 225, 199 Pac. 13 (holding that negligence is inferable from the fact that a pedestrian was in daylight struck from behind by an automobile, and that a nonsuit was improper); Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 Pac. 388 (action for balance due on salary); McKay v. McKay, 184 Cal. 742, 195 Pac. 385 (action by wife against executor of husband to recover money loaned); O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674 (action for damages for injuries caused by the falling of an elevator alleged to have been improperly constructed); Burr v. United Railroads, 163 Cal. 663, 126 Pac. 873 (action for damages to automobile from collision with an electric street-car); Davis v. Crump, 162 Cal. 513, 123 Pac. 294 (action to quiet title); Kimic v. San Jose-Los Gatos etc. Ry. Co., 156 Cal. 379, 104 Pac. 986 (action by passenger on car of one carrier against another carrier for damages for injuries resulting from collision); Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 Pac. 172 (action by an administrator of deceased wife to recover money claimed to be her separate property); Gilliam v. Brown, 126 Cal. 160, 58 Pac. 466 (holding in an action upon a contract for the construction of a ditch, that the plaintiff need not prove, and cannot be nonsuited for failure to prove, an acceptance of the ditch); Goldstone v. Merchants' Ice & C. S. Co., 123 Cal. 625, 56 Pac. 776 (action for possession of turkeys); Berliner v. Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922 (action to recover upon insurance policy); Plass v. Plass, 121 Cal. 131, 53 Pac. 448 (an action of ejectment by a tenant in common); Chapman v. Neary, 115 Cal. 79, 46 Pac. 867 (action for attorney's fees); Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408 (action for recovery of land); Anderson v. Hinshaw, 110 Cal. 682, 43 Pac. 389 (action for damages for injuries received by falling of derrick mast); Warren v. McGill, 103 Cal. 153, 37 Pac. 144 (action to recover money due from an estate); Byrnes v. Moore, 93 Cal. 393, 29 Pac. 70 (action of claim and delivery brought against sheriff); Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108 (action to recover property held by trustee in loco parentis); Franklin v. Southern California Motor Road Co., 85 Cal. 63, 24 Pac. 723 (action for damages for injuries sustained by passenger struck by a passing engine after alighting from car); Leahy v. Southern Pacific R. R. Co., 65 Cal. 150, 3 Pac. 622 (action for death of brakeman on train resulting from defective brake appliances); Oakland Bank of Savings v. Burnham, 59 Cal. 4 (action

Although the early practice in England and in this country was otherwise, it is now settled that a mere scintilla of evidence will not justify a judge in leaving

upon bond of bookkeeper); McKee v. Greene, 31 Cal. 418 (action involving a boundary dispute); Cravens v. Dewey, 13 Cal. 40; (action for balance due for goods sold); De Ro v. Cordes, 4 Cal. 117 (action against plaintiff's agent to effect an insurance on a ship, to recover the amount collected by the defendant after loss); Wells v. Snow, 5 Cal. Unrep. 150, 41 Pac. 858 (an action for money had and received based upon a recission of an agreement between the parties); Kleist v. Priem, 34 Cal. App. Dec. 263, 196 Pac. 72 (action for damages for false representations made in an exchange of land); Wilson v. Southern Pacific Land Co., 46 Cal. App. 738, 189 Pac. 1040 (action to rescind contract for sale of real property); Fisk v. Poplin, 46 Cal. App. 587, 189 Pac. 722 (action for injuries sustained when struck by automobile at street intersection); Long v. John Breuner Co., 36 Cal. App. 630, 172 Pac. 1132 (action for damages for injuries resulting from fall on inclined entrance to building); Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 Pac. 25 (action for damages for death of an employee resulting from the negligent operation of a derrick); Donovan v. Kemper, 26 Cal. App. 352, 146 Pac. 1044 (action by assignee of one joint maker of a promissory note against the comaker to recover the amount paid on the note by the former); Hill v. Pacific Gas. & Electric Co., 22 Cal. App. 788, 136 Pac. 492 (action for damages for death of employee resulting from an electric shock); Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914 (action to set aside a deed on the ground of mental incompetency of the grantor, and of fraud and undue influence); Olson-Mahoney etc. Co. v. Maxwell, 18 Cal. App. 668, 124 Pac. 100 (action to foreclose mechanic's lien); Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340 (action of claim and delivery by widow claiming the property involved to be her separate property); Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 749, 108 Pac. 717 (action for conversion of exempt property); Non-Refillable Bottle Co. v. Robertson, 8 Cal. App. 103, 96 Pac. 324 (action upon a promissory note); Union Ice Co. v. Doyle, 6 Cal. App. 284, 92 Pac. 112 (a suit to correct a misdescription of land in a deed and to quiet title); Keifer v. Myers, 5 Cal. App. 668, 91 Pac. 163 (action to redeem from pledge); Anderson v. Bank of Santa Cruz County, 4 Cal. App. 427, 88 Pac. 379 (an action to recover money deposited in a bank); Archibald Estate v. Matteson, 7 Cal. Unrep. 252, 84 Pac. 840, Id., 5 Cal. App. 441, 90 Pac. 723 (action for money loaned by a corporation).

See the following cases where it was held that a nonsuit was properly granted: Estate of Chevallier, 159 Cal. 161, 113 Pac. 130 (action to contest a will on the ground of insanity of the testator); In re Little's Estate, 46 Cal. App. 776, 189 Pac. 818 (will contest); In re Campbell's Estate, 46 Cal. App. 612, 189 Pac. 812 (action to contest a will on the ground of incompetency of testator); Johnson v. Southern

a case to the jury. Judges are no longer required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.[16] Therefore, to avoid a nonsuit, the evidence of the plaintiff must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists.[17] The court may grant the motion when, viewing the evidence of the plaintiff in its most favorable aspect for him, it is of the opinion that the evidence will not support a verdict in his favor,[18] or where the evidence does not establish a prima facie case.[19]

California Edison Co., 27 Cal. App. 425, 150 Pac. 656 (action for damages for death of an electrician); White v. Spreckels, 10 Cal. App. 287, 101 Pac. 920 (action for damages resulting from explosion of steam radiator); Hercules Oil Refining Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341 (an action for money embezzled by directors of a corporation); Fish v. Correll, 4 Cal. App. 521, 88 Pac. 489 (action upon written contract for tombstone).

16. Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 622, 91 Pac. 115, quoting Byrd v. Southern Express Co., 139 N. C. 273, 51 S. E. 851.

17. Goldstone v. Merchants' Ice & C. S. Co., 123 Cal. 625, 56 Pac. 776; Hercules Oil Refining Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341 (quoting from Janin v. London & S. F. Bank, 92 Cal. 14, 27 Am. St. Rep. 82, 14 L. R. A. 320, 27 Pac. 1100); Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723.

18. McKenzie v. Ray, 168 Cal. 618, 143 Pac. 1018; Moore v. Murdock, 26 Cal. 514; Ensminger v. McIntire, 23 Cal. 593; Dalrymple v. Hanson, 1 Cal. 125; White v. Spreckels, 10 Cal. App. 287, 101 Pac. 920; Paolini v. Fresno Canal & Irr. Co., 9 Cal. App. 1, 97 Pac. 1130.

It is settled law in California that a court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict or judgment in his favor if such a verdict or judgment were given. Perera v. Panama-Pacific I. E. Co., 179 Cal. 63, 175 Pac. 454; Estate of Caspar, 172 Cal. 147, 155 Pac. 631.

19. Cleary v. Folger, 4 Cal. Unrep. 76, 33 Pac. 877 (a nonsuit is proper if the evidence of the plaintiff does not make out his case, whether the

It may grant the motion where there is no evidence at all upon any point and also where there is no evidence upon some material point to be proved.[20] It is the duty of the court, however, to deny a motion made at the close of the plaintiff's case, if there is any evidence,[1] or any substantial evidence,[2] which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the

evidence consist of testimony or of stipulated facts).

20. Bayly v. Lee, 174 Cal. 137, 162 Pac. 96 (failure to prove payment or tender); Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837 (where there was no proof of performance of a condition precedent to suit); Harney v. McLeran, 66 Cal. 34, 4 Pac. 884; Herman v. Haffenegger, 54 Cal. 161 (granting a nonsuit in an action to rescind a contract where the plaintiff failed to prove a return of everything of value received by him); Stoddart v. Van Dyke, 12 Cal. 437. (In an action against several promisors on a note, in which the evidence fails to show the execution of the note by one of them, a nonsuit as to him is properly rendered); Metz v. Bell, 7 Cal. Unrep. 41, 70 Pac. 618 (an action upon a promise where there was a failure to prove the handwriting of the deceased promisor); Gilman v. Bootz, 63 Cal. 120; Ringgold v. Haven, 1 Cal. 108.

1. Davis v. Crump, 162 Cal. 513, 123 Pac. 294; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; Heilbron v. Last Chance W. D. Co., 2 Cal. Unrep. 633, 9 Pac. 456; Craven v. Nolan, 2 Cal. Unrep. 551, 8 Pac. 518; Fererira v. Silvey, 38 Cal. App. 346, 176 Pac. 371; Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 Pac. 25; McEwen v. Occidental Life Ins. Co., 20 Cal. App. 477, 129 Pac. 598; Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709; Non-Refillable Bottle Co. v. Robertson, 8 Cal. App. 103, 96 Pac. 324 (citing Janin v. London etc. Bank, 92 Cal. 14, 27 Am. St. Rep. 82, 14 L. R. A. 320, 27 Pac. 1100); Union Ice Co. v. Doyle, 6 Cal. App. 284, 92 Pac. 112; Fish v. Correll, 4 Cal. App. 521, 88 Pac. 489. See Wehner v. Bauer, 160 Fed. 240, where the court say: "In order to sustain a motion of this kind the defendant is bound to make case so free from doubt that the court can say that there is no reasonable ground upon which it can continue to entertain the case or put the defendant to his defense. If there is any question of doubt left, the court is bound to leave the parties to their proof and final hearing."

2. Burr v. United Railroads, 163 Cal. 663, 126 Pac. 873; Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Kleist v. Preim, 34 Cal. App. Dec. 263, 196 Pac. 72; Hill v. Pacific Gas & Electric Co., 22 Cal. App. 788, 136 Pac. 492; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914; Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340; Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

averments of the complaint, or, in other words, where the plaintiff's evidence is sufficient to support a judgment on the verdict.[3] It should deny a nonsuit even where there is a conflict in the evidence and some evidence tends to sustain the plaintiff's case,[4] or when the evidence of the plaintiff is such that different conclusions can reasonably be drawn therefrom.[5] If there is any doubt, it is the duty of the court to let the case go to the jury.[6]

§ 37. Application of Rule.—In accordance with the foregoing rules, a court may grant a motion for nonsuit whenever the evidence brought out upon the direct or cross-examination of the plaintiff[7] so conclusively establishes a defense as that the court might properly grant a new trial in case of a verdict in his favor upon like evidence.[8] It may, for example, nonsuit a plaintiff in a negligence suit when his evidence establishes that he was guilty of contributory negligence as a matter of law,[9] or when a ver-

3. Davis v. Crump, 162 Cal. 513, 123 Pac. 294; Estate of Chevallier, 159 Cal. 161, 113 Pac. 130; Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 Pac. 172; Goldstone v. Merchants' Ice & C. S. Co., 123 Cal. 625, 56 Pac. 776; Bowley v. Mangrum & Otter, 3 Cal. App. 229, 84 Pac. 996.

4. Pacific Mutual L. I. Ins. Co. v. Fisher, 109 Cal. 566, 42 Pac. 154; Hill v. Pacific Gas & Electric Co., 22 Cal. App. 788, 136 Pac. 492; Christenson Lumber Co. v. Buckley, 17 Cal. App. 37, 118 Pac. 466.

5. Burr v. United Railroads, 163 Cal. 663, 126 Pac. 873; Redington v. Pacific P. T. C. Co., 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432; Long v. John Breuner Co., 36 Cal. App. 630, 172 Pac. 1132. See infra, § 37.

6. Bush v. Weed Lumber Co., 36 Cal. App. Dec. 951, 204 Pac. 24 (citing Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426).

7. Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 Pac. 697.

8. Janson v. Brooks, 29 Cal. 214. See cases cited in next note following.

9. Vinson v. Los Angeles Pacific R. R. Co., 147 Cal. 479, 82 Pac. 53; Goldstone v. Merchant's Ice & C. S. Co., 123 Cal. 625, 56 Pac. 776; McGraw v. Friend & Terry Lumber Co., 120 Cal. 574, 52 Pac. 1004; Nagle v. California South. R. R. Co., 88 Cal. 86, 25 Pac. 1106; McQuilken v. Central Pac. R. R. Co., 50 Cal. 7; Mayer v. Anderson, 36 Cal. App. 740, 173 Pac. 174 (action by person run down by automobile); Ford v. Weed Lumber Co., 25 Cal. App. 702, 147 Pac. 112; Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709 (contributory negligence of foreman of sawmill); Bohn v.

dict in his favor must be set aside,[10] but not where reasonable men might well differ as to whether the plaintiff was guilty of contributory negligence.[11] When a defendant has pleaded the bar of the statute of limitations, a motion for nonsuit will be granted if the plaintiff's evidence shows that his action is barred,[12] but not where he makes a prima facie case for recovery within the statutory period.[13] So also in an action for money due, a failure of the plaintiff to deny the genuineness of written receipts set up in the answer, as required by section 448 of the Code of Civil Procedure, is such an admission of payment as justifies a nonsuit.[14] Where the evidence of a plaintiff shows him to be entitled to some relief, he cannot be nonsuited because he is not entitled to all the relief prayed for,[15] as, for example, where a plaintiff is entitled to nominal damages but fails to prove any actual damages.[16] If enough

Pacific Electric Ry. Co., 5 Cal. App. 622, 91 Pac. 115. See Negligence.

10. Franklin v. Southern California Motor Road Co., 85 Cal. 63, 24 Pac. 723 ("nonsuit on the ground of contributory negligence should only be granted, when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must be set aside"); Schierhold v. North Beach & M. R. R. Co., 40 Cal. 447. Quoted in Davis v. Pacific Power Co., 107 Cal. 563, 48 Am. St. Rep. 156, 40 Pac. 950; and in Jamison v. San Jose & S. C. R. R. Co., 55 Cal. 593.

11. Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 Pac. 53; Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555; Doyle v. Eschen, 5 Cal. App. 55, 89 Pac. 836; Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 Pac. 738, 903 (holding that the plaintiff, under the evidence, was not guilty of negligence as a matter of law and that a nonsuit was improper); Bowley v. Mangrum & Otter, 3 Cal. App. 229, 84 Pac. 996 (plaintiff held not guilty of contributory negligence per se in walking over trap elevator doors in a sidewalk).

12. Beeson v. Schoss, 183 Cal. 618, 192 Pac. 292. See Norton v. Zellerbach, 2 Cal. Unrep. 181, holding a nonsuit based on the statute of limitations is improper where the time of the conversion of the property involved does not appear by the pleadings or testimony. See Limitation of Actions.

13. Hansen v. Vallejo Electric Light etc. Co., 182 Cal. 492, 188 Pac. 999.

14. McKenzie v. Ray, 168 Cal. 618, 143 Pac. 1018. As to necessity for denial in such case, see Pleading.

15. Zellner v. Wassman, 184 Cal. 80, 193 Pac. 84; Fox v. Hall, 164 Cal. 287, 128 Pac. 749.

16. Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618.

of the facts set forth in the complaint are established by evidence to constitute a good cause of action, then a nonsuit should not be granted although other allegations are not proven.[17] And, of course, a failure to introduce evidence upon a point admitted by the pleadings will not justify a nonsuit.[18] Likewise, a nonsuit is improper where a defendant has filed no answer.[19]

Variance.—A motion for a nonsuit is a proper remedy by which to take advantage of a variance between the pleadings and proof.[20] And a defendant does not waive his right to make such motion by failing to object to the testimony when introduced.[1] After such motion, the court may, upon terms, allow an amendment of the complaint if it will not operate as a surprise upon the defendant.[2]

§ 38. **Determination of Motion Made at Close of All Evidence.**—The rule governing the determination of the question whether a nonsuit should or should not be granted in a given case does not always apply with the same strictness where the motion is made after the evidence on both sides is all in.[3] The rule governing in the latter case is not materially different from that which obtains in case of a motion for a directed verdict,[4] that is to say, a court

17. Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766.

18. Vaca Valley etc. R. R. v. Mansfield, 84 Cal. 560, 24 Pac. 145; Powell v. Oullahan, 74 Cal. 114.

19. Schwartz v. De Wit, 1 Cal. Unrep. 40.

20. Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Whitney v. Purrington, 59 Cal. 36; Johnson v. Moss, 45 Cal. 515; Tomlinson v. Monroe, 41 Cal. 94; Farmer v. Cram, 7 Cal. 135; Gardstrom v. L. E. White Lumber Co., 21 Cal. App. 744, 132 Pac. 842; Fox v. Robinson, 18 Cal. App. 585, 123 Pac. 813; Bailey v. Brown, 4 Cal. App. 515, 88 Pac. 518. As to variance in general, see Pleading.

1. Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Johnson v. Moss, 45 Cal. 515.

2. Farmer v. Cram, 7 Cal. 135.

3. In re Campbell's Estate, 46 Cal. App. 612, 189 Pac. 812; McEwen v. Occidental Life Ins. Co., 20 Cal. App. 477, 129 Pac. 598.

4. Perera v. Panama-Pacific I. E. Co., 179 Cal. 63, 175 Pac. 454; Estate of Caspar, 172 Cal. 147, 155 Pac. 631; Estate of Morey, 147 Cal. 495, 82 Pac. 57. See Trial.

has a discretion and it is not error to grant the motion where, upon all the evidence, it is clear that if the jury would bring in a verdict against the defendant, it would be the duty of the court to set it aside and order a new trial.[5] This does not mean that in every case where the trial court might properly grant a new trial for insufficiency of evidence for a plaintiff it should grant a motion for nonsuit made after both parties rest their case, but only that it should do so in very clear cases,[6] which is practically the rule which controls in directing a verdict.[7] Under this rule it has been held that a nonsuit may be granted at the conclusion of all the evidence where the evidence of the plaintiff is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains,[8] or where undisputed evidence establishes a complete defense to the action and there is no conflicting evidence, and nothing proper to be submitted to the jury.[9]

5. Estate of Higgins, 156 Cal. 257, 104 Pac. 6; Estate of Morey, 147 Cal. 495, 82 Pac. 57; Estate of Dole, 147 Cal. 188, 81 Pac. 534; Downing v. Murray, 113 Cal. 455, 45 Pac. 869; Fox v. Southern Pacific Co., 95 Cal. 234, 30 Pac. 384; Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736; Geary v. Simmons, 39 Cal. 224; Mateer v. Brown, 1 Cal. 221; Ringgold v. Haven, 1 Cal. 108; Figone v. Guisti, 43 Cal. App. 606, 185 Pac. 694; Lemmermann v. Pope & Talbot, 42 Cal. App. 192, 183 Pac. 467; Grantham v. Ordway, 40 Cal. App. 758, 182 Pac. 73; Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426; Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 622, 91 Pac. 115; King v. Hercules Powder Co., 39 Cal. App. 223, 178 Pac. 531 (holding a court is justified in granting a motion for nonsuit after the evidence on both sides has been heard, where a verdict for the plaintiff would have been set aside, as not supported by, but contrary to the evidence).

6. Estate of Morey, 147 Cal. 495, 82 Pac. 57; Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426.

7. See Trial.

8. Estate of Higgins, 156 Cal. 257, 104 Pac. 6. This is a will contest in which a nonsuit was held to have been properly granted where the presumption of undue influence arising from the confidential relations between the testator and the proponent was fully met and overthrown by the uncontradicted evidence showing the actual circumstances surrounding the preparation of the will.

9. Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736. This was an action to recover the possession of wheat claimed by the plaintiff as purchaser from M., and the defendant, a sheriff, justified the taking under

A nonsuit may be granted even though there is some conflict in the evidence, if the evidence is clearly insufficient to support a verdict for the plaintiff.[10] But it cannot properly be granted if there is a substantial conflict in the evidence upon a material issue.[11] In other words, when once a plaintiff has adduced such evidence as if uncontradicted would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury.[12] Whenever a plaintiff proves a state of facts from which a presumption arises, such presumption is evidence, which, even if disputable, is sufficient to support a finding in accordance therewith notwithstanding there may be evidence to the contrary. Therefore, the mere fact that the defendant introduces evidence in conflict with the presumption does not dispel it so as to entitle him to a nonsuit. Whether the presumption has been controverted is a question for the jury.[13]

§ 39. Reopening Case and Completion of Proof.—Inasmuch as one of the chief objects subserved by a motion for nonsuit is to point out the oversights and defects in the plaintiff's proofs, so that he can supply if possible the specified deficiencies, a trial court may, in its discretion, permit the plaintiff to reopen his case and introduce further testimony, after the making of the motion and before

an attachment in a suit against M. and introduced evidence showing that there had been no actual and continued change of possession of the wheat. Upon the close of the evidence the plaintiff was nonsuited.

10. Estate of Morey, 147 Cal. 495, 82 Pac 57 (quoting Lacy v. Porter, 103 Cal. 597, 37 Pac. 635); King v. Hercules Powder Co., 39 Cal. App. 223, 178 Pac. 531.

11. Noakes v. Los Angeles, 179 Cal. 38, 175 Pac. 409; Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 Pac. 168; Simpson v. Applegate, 67 Cal. 471, 8 Pac. 39.

12. Dublin etc. R. R. Co. v. Slattery, 3 App. Cas. 1155, per Barry, J. Approved in Estate of Chevallier, 159 Cal. 161, 113 Pac. 130, and also in In re Little's Estate, 46 Cal. App. 776, 189 Pac. 818, 822.

13. Grantham v. Ordway, 40 Cal. App. 758, 182 Pac. 73. Contra, King v. Hercules Powder Co., 39 Cal. App. 223, 178 Pac. 531. See Appeal and Error, vol. 2 p. 933, as to corresponding rule upon appeal.

decision thereon.[14] Indeed, it may be an abuse of discretion to deny an application therefor, especially where the statute of limitations would bar a new action.[15] If a plaintiff is allowed to open his case for further evidence, and supplies the omitted proof, any error in denying a nonsuit is harmless.[16] So also where a defendant does not stand on his motion made at the close of plaintiff's case and afterwards introduces evidence supplying the defects in plaintiff's proof, he thereby waives or cures any error in overruling his motion,[17] or at least renders any error in denying the motion harmless.[18]

Relief from stipulation submitting case on motion.— Under section 473 of the Code of Civil Procedure it is within the discretion of court to relieve a plaintiff from

14. San Pedro Lumber Co. v. Schroeter, 156 Cal. 158, 103 Pac. 888; Fuller v. Arnold 98 Cal. 522, 33 Pac. 445; Low v. Worden, 70 Cal. 19, 11 Pac. 350; Abbey Homestead Assn. v. Willard, 48 Cal. 614. See Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289, where the courts say that it is the duty of the court to permit the plaintiff to supply the missing evidence when he offers to do so. See TRIAL, as to reopening case generally.

15. Low v. Worden, 70 Cal. 19, 11 Pac. 350.

16. Bublitz v. Reeves, 40 Cal. App. 75, 180 Pac. 28.

17. Cosby v. Cline, 186 Cal. 698, 200 Pac. 801; Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Levey v. Henderson, 177 Cal. 21, 169 Pac. 673; Peters v. Southern Pac. Co., 160 Cal. 48, 116 Pac. 400; Lowe v. San Francisco & N. W. Ry. Co., 154 Cal. 573, 98 Pac. 678; Lyon v. United Moderns, 148 Cal. 470, 113 Am. St. Rep. 291, 7 Ann. Cas. 672, 4 L. R. A. (N. S.) 247, 83 Pac. 804; Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463; Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Vaca Valley etc. R. R. v. Mansfield, 84 Cal. 560, 24 Pac. 145; Higgins v. Ragsdale, 83 Cal. 219, 23 Pac. 316; Schlessinger v. Mallard, 70 Cal. 326, 11 Pac. 728; Abbey Homestead Assn. v. Willard, 48 Cal. 614; Perkins v. Thornburgh, 10 Cal. 189; Winans v. Hardenbergh, 8 Cal. 291; Smith v. Compton, 6 Cal. 24; Ringgold v. Haven, 1 Cal. 108; Madden v. Ashman, 1 Cal. Unrep. 583; Armock v. United Railroads, 37 Cal. App. Dec. 107, 204 Pac. 856; Los Angeles County v. Rindge Co., 35 Cal. App. Dec. 392, 200 Pac. 27; Werner v. Southern Pac. Co., 44 Cal. App. 76, 185 Pac. 1016; Van Horn v. Pacific Refining etc. Co., 27 Cal. App. 105, 148 Pac. 951; Donovan v. Kemper, 26 Cal. App. 352, 146 Pac. 1044; Hill v. Clark, 7 Cal. App. 609, 95 Pac. 382.

18. See APPEAL AND ERROR, vol. 2, p. 1025.

a stipulation submitting the case on motion for nonsuit and to allow him to file an amended complaint.[19]

§ 40. Findings and Order and Effect Thereof.—No findings of fact and conclusions of law are necessary in case of a nonsuit,[20] and where the action is properly dismissed as to a codefendant, no finding as to his interest is required.[1]

Entry of nonsuit.—In 1897, section 581 of the Code of Civil Procedure was amended by the addition of the following provision: "The dismissals mentioned in subdivisions three, four, and five of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered, but the clerk of the court must note such orders in his register of actions in the case."[2] Under the present state of the law it is not necessary that a formal judgment of dismissal follow an order or judgment of nonsuit embraced by this provision, and it is not necessary that the order or judgment be entered in the judgment-book at all.[3] But a dismissal under this section is ineffectual until made by order

The rule is that any error in denying a nonsuit is of no consequence if upon the conclusion of the whole case there is evidence upon the material issues warranting the submission of the cause to the jury. Bublitz v. Reeves, 40 Cal. App. 75, 180 Pac. 28; Sander v. Los Angeles Ry. Corp., 38 Cal. App. 222, 175 Pac. 901; Silva v. Northern California Power Co., 32 Cal. App. 139, 162 Pac. 412.

19. Robinson v. Exempt Fire Co., 103 Cal. 1, 42 Am. St. Rep. 93, 24 L. R. A. 715, 36 Pac. 955. See Stipulations.

20. Jewell v. Pierce, 120 Cal. 79, 52 Pac. 132; Kennedy & Shaw Lumber Co. v. Dusenbery, 116 Cal. 124, 47 Pac. 1008; Snell v. Payne, 115 Cal. 218, 46 Pac. 1069; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Harney v. McLeran, 66 Cal. 34, 4 Pac. 884; Reynolds v. Brumagim, 54 Cal. 354; Gilson Quartz Mining Co. v. Gilson, 47 Cal. 597; New York Life Ins. Co. v. Daley, 25 Cal. App. 376, 143 Pac. 1033. As to findings in general, see Trial.

1. Pacific Paving Co. v. Vizelich, 1 Cal. App. 281, 82 Pac. 82.

2. Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882. See Appeal and Error, vol. 2, p. 158.

3. Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882.

of the court entered upon the minutes.[4] Where in a contest of a will and codicil a nonsuit is granted as to one instrument, the judgment thereon may be entered immediately, and before the final determination of the entire contest.[5] An order which does not purport to be a dismissal of the action but a mere memorandum affording data from which a judgment or proper order might be drafted is not the order contemplated by this section of the code.[6]

Effect of nonsuit.—The effect of an order of nonsuit against a plaintiff is that a plaintiff is entitled to no relief against the defendant on account of matters alleged in his complaint.[7] It is in effect a dismissal of the action,[8] unless a cross-complaint is filed and issues are made thereon. In the latter case, the cross-complainant is entitled to a trial of the issues raised upon the cross-complaint.[9] An order nonsuiting a plaintiff as to certain defendants does not affect the action as against the others,[10] and if the latter default, the nonsuit will not affect the plaintiff's right to a judgment against them.[11] So also when there is an intervener who claims an interest in the property in dispute adverse to both the plaintiff and defendant, a nonsuit granted on the motion of the defendant will not affect the right of the plaintiff and intervener to be heard upon the issues raised on the intervention.[12]

4. Lampton v. Davis Standard Bread Co., 32 Cal. App. Dec. 514, 191 Pac. 710.

5. Estate of Ricks, 160 Cal. 450, 117 Pac. 532.

6. Ferris v. Baker, 127 Cal. 520, 59 Pac. 937.

7. San Francisco v. Brown, 153 Cal. 644, 96 Pac. 281; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737.

8. San Francisco v. Brown, 153 Cal. 644, 96 Pac. 281; Wood v. Ramond, 42 Cal. 643, distinguished in Warner v. Darrow, 91 Cal. 309, 27 Pac. 737. See supra, § 16.

9. Warner v. Darrow, 91 Cal. 309, 27 Pac. 737, following Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1142.

10. Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830.

11. Kennedy & Shaw Lumber Co. v. Dusenbery, 116 Cal. 124, 47 Pac. 1008. As to defaults generally, see JUDGMENT.

12. Poehlmann v. Kennedy, 48 Cal. 201.

(J. O. T.)

DISORDERLY CONDUCT.

1. In General.
2. Disturbing Public Meetings.

§ 1. **In General.**—Disorderly conduct was not an offense at common law, and it is not forbidden by the general state law, per se, although there are acts amounting to disorderly conduct which come under the ban of the general law. For example, it is an offense under the Penal Code for one maliciously and willfully to disturb the peace or quiet of any neighborhod or person, by loud or unusual noise, or by tumultuous or offensive conduct.[1] But there are other acts not amounting to criminal offenses against the state which would also be disorderly conduct. It is within the power of municipalities by ordinance to forbid acts of the latter character, and they have done so in some instances.[2]

Disorderly conduct is not the same as a breach of the peace, riot, rout, unlawful assembly or affray. While it may in many cases amount to a breach of the peace, it does not necessarily do so. It embraces all acts as are of such a nature as to corrupt the public morals or to outrage the sense of public decency; that is to say, any words or acts which tend in some degree to disturb the peace or good order of a town or city, or have a vicious or injurious tendency.[3] And an ordinance forbidding disorderly

1. See BREACH OF THE PEACE, vol. 4, p. 473.

2. For example, see Ordinance No. 487 of the city of Pasadena; Ordinance No. 7 of the city of San Gabriel; Ordinance No. 26 of the city of Sawtelle.

3. See 8 Ruling Case Law, 345.

conduct could include all such acts which do not per se constitute criminal offenses under the general laws of the state.

§ 2. Disturbing Public Meetings.—Section 403 of the Penal Code provides that "Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting, not unlawful in its character, other than such as is mentioned in sections 59 and 302, is guilty of a misdemeanor."[4] Although the body of this section does not in terms state that the assembly must be public, this is stated in the title of the section, which is "Disturbance of Public Meetings, Other Than Religious or Political." And since the title must be deemed a part of the substance of the enactment, and accorded the same effect as though written into the body of the law, the section must be construed as not applicable to one who disturbs an assembly or meeting, unless it further appears that such meeting or assembly was of a public character. It follows that a complaint charging a violation of this section must show that the assembly or meeting was a public one other than such as is mentioned in sections 59 and 302 of the Penal Code.[5]

4. As to what conduct amounts to offense of disturbing public or religious meeting, see 12 A. L. R. 650, note.

5. Farraher v. Superior Court, 45 Cal. App. 4, 187 Pac. 72. See STATUTES.

DISORDERLY HOUSES.

I. In General.

II. Abatement.

I. In General.

1. Introductory.
2. Police Regulation and License.
3. Letting Use of House.
4. Information or Complaint—Evidence.

II. Abatement.

5. In the Absence of Statute.
6. Under the Abatement Act.
7. Parties.
8. Complaint.
9. Abatement of Nuisance by Parties as a Defense.
10. Evidence Generally.
11. Evidence of Reputation.
12. Evidence of Detectives and Investigators.
13. Findings.
14. Judgment.
15. Injunction and Contempt Proceedings.
16. Sale of Property—Costs and Supersedeas.
17. Cancellation of Order of Abatement.

Cases are cited in this article to and including 187 Cal., 45 Cal. App. and 207 Pac.

I. IN GENERAL.

§ 1. Introductory.—This article treats of the keeping and letting of disorderly houses and the prosecution for the offense thereof, the regulation and licensing of such houses, and their abatement or suppression. Elsewhere are treated the crimes of abduction,[1] breach of the peace,[2] gaming,[3] lewdness,[4] prostitution,[5] and vagrancy.[6]

While the term "disorderly houses," speaking generally, includes any place of public resort where the peace, comfort, or decency of the neighborhood is habitually disturbed, and the conduct of the inmates of which constitute a public nuisance, yet ordinarily the term has a more restricted significance and is especially adapted and applied to houses of prostitution.[7] Houses of ill fame generally are houses of prostitution.[8] The keeping of such houses is subversive of the public morals and decency and affects injuriously the sexual life of the people in a manner and to an extent unparalled by any other act.[9] And therefore it has been made a crime in California. In this respect the Penal Code provides as follows:

"Every person who keeps a house of ill fame in this state, resorted to for the purposes of prostitution or lewdness, or who willfully resides in such house, is guilty of a misdemeanor."[10]

"Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort,

1. See ABDUCTION, vol. 1, p. 87.

2. See BREACH OF THE PEACE, vol. 4, p. 471.

3. See GAMING.

4. See LEWDNESS.

5. See PROSTITUTION.

6. See VAGRANCY.

7. See 9 Ruling Case Law, 217. Disorderly character of house as affected by number of females residing therein or resorting thereto for immoral purposes, see ABDUCTION, vol. 1, p. 93; and 12 A. L. R. 529, note.

8. In re Selowsky, 38 Cal. App. 569, 177 Pac. 301.

9. Selowsky v. Superior Court, 180 Cal. 404, 181 Pac. 652.

10. Pen. Code, § 315, in part. As to power to prohibit disorderly houses, see CONSTITUTIONAL LAW, vol. 5, p. 707.

or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner . . . is guilty of a misdemeanor."[11]

The code also declares it to be a crime to let an apartment or tenement knowing it is to be used for purposes of assignation or prostitution,[12] and to live in or about houses of ill fame.[13] But the code does not make it an offense, merely to visit or frequent houses of ill fame for the purpose of prostitution, although it is within the power of a municipality to declare such acts an offense,[14] provided the penalty prescribed is reasonable and in harmony with the laws of the state.[15]

§ 2. Police Regulation and License.—Houses of common prostitution are public places, that is to say, places to which all men may resort without invitation, and the approaches which are furnished, and which are generally used in order to reach such places, are public ways, even though there may be swinging doors across them. From this fact it follows that, in the enforcement of the law, a police officer has a legal right to enter upon and traverse the public approaches and passageways in such houses, the same as any other member of the public. A police officer may patrol these passageways to deter by his presence the commission of crime as he may patrol any other public thoroughfare. He may remain there to make observations, and make inquiries to obtain evidence; he may ask the names and addresses of those he finds there with that object in view, and if his presence has the effect of driving visitors away, or deterring them from coming, it

11. Pen. Code, § 316.

12. See infra, § 3.

13. Pen. Code, § 647. To prove a crime under this provision, the character of the house where the accused is charged with living in and about must necessarily be shown. In re Selowsky, 38 Cal. App. 569, 177 Pac. 301. See VAGRANCY.

14. Ex parte Johnson, 73 Cal. 228, 15 Pac. 43.

15. In re Ah You, 88 Cal. 99, 22 Am. St. Rep. 280, 11 L. R. A. 408, 25 Pac. 974, holding unreasonable an ordinance which permitted a maximum of one thousand dollars. See MUNICIPAL CORPORATIONS.

has a proper and legitimate effect. So, too, he may warn those who are about to enter such places of their character and the provisions of any ordinance against visiting them. The lessors and the inmates of the premises cannot claim equitable relief from such interference by the police. Nor can such interference be enjoined at the instance of one conducting a business of restaurant and cigar stand in the passageways leading to the premises, especially where it appears that the injury to the plaintiff's business is merely a pretense, and that the real object of the suit is the protection of the house of prostitution.[16] A police department, however, is without authority to abrogate a penal statute and allow the keeping of houses of prostitution.[17] Neither has a municipality authority to license them, even though it is operating under a freeholders' charter and the charter purports to grant such power. The charter powers may not be so exercised as to conflict with the general laws, save only in regard to what may properly be called "municipal affairs," and the licensing of forms of vice and crime which are both mala in se and mala prohibitum cannot be so classed. It follows that if such a license is given it is void and will constitute no defense to an action to abate the nuisance.[18]

§ 3. Letting Use of House.—Under section 316 of the Penal Code "every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor." Since a contract for the letting of apartments for prosti-

16. Pon v. Wittman, 147 Cal. 280, 2 L. R. A. (N. S.) 683, 81 Pac. 984. As to exercise of police power generally, see MUNICIPAL CORPORATIONS. And see INJUNCTION, as to the right in general to an injunction against interference by the police. In the same connection, see note in 2 L. R. A. (N. S.) 678.

17. Chateau v. Singla, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015.

18. Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901. See MUNICIPAL CORPORATIONS.

tution is not only against public policy and good morals, but also against the express mandate of the statute, such a contract is illegal and may not be made the foundation of any action either in law or in equity. For example, a landlord who knowingly makes such a contract cannot maintain an action thereon to recover his rent.[19] So also when a partnership is formed to carry on the business of letting apartments for purposes of prostitution, neither partner can maintain an action against the other for an accounting, regardless of the fact that the tenements are located in a portion of the city mainly inhabited by prostitutes.[20] Upon the same reasoning no recovery can be had for services rendered in collecting rents from the inmates of a house of ill fame.[1]

§ 4. **Information or Complaint—Evidence.**—In charging the keeping of a house of ill fame, it is well settled that it is sufficient to allege generally that the premises are used for the purpose of lewdness, assignation and prostitution, without alleging the name or character of the frequenters of the house, or alleging particular acts of lewdness, assignation or prostitution.[2]

Evidence.—In a prosecution for keeping a house of ill fame it must be shown that the defendant is the keeper of the house alleged to be a house of ill fame, and that the house is of the character alleged, or, in other words, that prostitution or lewdness is practiced therein. It is obviously true that in proving the latter, circumstantial evidence must be relied upon, for, particularly as to acts of prostitution or assignation, it is rarely the case that direct evidence of such a fact may be obtained or is available.[3-4]

19. Demartini v. Anderson, 127 Cal. 33, 59 Pac. 207. See CONTRACTS, vol. 6, p. 124.

20. Chateau v. Singla, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015.

1. Ballerino v. Ballerino, 147 Cal. 544, 2 Pac. 199.

2. Selowsky v. Superior Court, 180 Cal. 404, 181 Pac. 652, citing cases from other jurisdictions.

3-4. In re Selowsky, 38 Cal. App. 569, 177 Pac. 301.

All the authorities seem to concur in holding that evidence of the characters of the inmates and frequenters of the house is admissible,[5] and although there is some conflict as to the admissibility of the reputation of the house itself, the better rule, and the rule in California, is that such evidence is admissible, in any case, whether civil or criminal, in which the character of such a house is an issue.[6] In 1905, section 315 of the Penal Code was amended by adding a provision to the effect that

"In all prosecutions for keeping or resorting to such a house [of ill fame] common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it."

It has been contended that this amendment indicates a legislative intention that such evidence may be admitted in prosecutions for keeping houses of ill fame but must be excluded in other cases, but there is nothing in the amendment indicating any such intention.[7] Moreover, in the Red-light Abatement Act adopted in 1913, it is specifically provided that such evidence shall be admitted.[8] Whenever the reputation of a house of ill fame at a particular time or knowledge thereof at such time is an issue in a case, evidence of reputation at a prior date may be admitted.[9] The character of the house is a matter of fact, not of opinion, and evidence with regard thereto is competent.[10]

5. Demartini v. Anderson, 127 Cal. 33, 59 Pac. 207.

6. Demartini v. Anderson, 127 Cal. 33, 59 Pac. 207, a civil case involving the validity of the lease of a house of prostitution.

7. People v. De Martini, 25 Cal. App. 9, 142 Pac. 898; People v. Nitta, 17 Cal. App. 152, 118 Pac. 946.

8. See infra, § 11.

9. Demartini v. Anderson, 127 Cal. 33, 59 Pac. 207; Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.

10. People v. Lock Wing, 61 Cal. 380.

II. ABATEMENT.

§ 5. **In the Absence of Statute.**—A house of prostitution is a nuisance per se, wherever situated.[11] And independently of statute a private person may maintain an action to abate it when specially injurious to him. In order to obtain complete relief, the owner of the property and the tenant should be joined as defendants, but a failure to join the latter is not fatal to the judgment, in the absence of a specific objection. When it appears that the owner of the property has knowledge of the purposes for which it was to be used, a sham provision in the lease prohibiting the use of the premises as a disorderly house does not constitute any defense to the action against him. For the purpose of showing such knowledge in the owner, evidence of the reputation of the place prior to the date of the lease may be admitted. Where the depreciation of plaintiff's property by the nuisance is shown, the plaintiff may recover damages.[12]

§ 6. **Under the Abatement Act.**—The legislature of 1913 passed the so-called "Red-light Abatement Law," which declares that "Every building or place used for the purpose of lewdness, assignation, or prostitution and every building or place wherein or upon which acts of lewdness, assignation, or prostitution are held or occur, is a nuisance which shall be enjoined, abated and prevented as hereinafter provided, whether the same be a public or a private nuisance."[13] The object of the act is the same as that of sections 315 and 316 of the Penal Code, but differs from them in that it establishes a summary method through the civil processes of the

11. Pon v. Wittman, 147 Cal. 280, 2 L. R. A. (N. S.) 683, 81 Pac. 984; Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901. See NUISANCE.

12. Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.

13. Act April 7, 1913; Stats. 1913, p. 20.

law, for putting a stop to the maintenance of houses of ill fame, as that designation is commonly understood and other like places where acts of lewdness and prostitution are habitually practiced and carried on as a business. This law is a valid exercise of the police power and the provisions therein contained as to forfeitures and procedure do not violate any of the constitutional guaranties of property owners. The act does not undertake to provide for a judgment otherwise than as against persons who are properly joined as defendants in the action and brought in by proper process and afforded an opportunity to be heard, and thus the requirement of due process is complied with.[14] And the provision which permits the building to be closed and kept closed against its use for any purpose for one year unless sooner released in the manner provided by law, is not objectionable as being unduly harsh, unreasonable and oppressive. In several jurisdictions where similar enactments exist, it has been held that this is a reasonable method of enforcing the judgment of abatement.[15]

A building may become a nuisance under the Abatement Act by being used for the purpose either of lewdness or of assignation or of prostitution, or by being used for the purposes of all those general acts. The terms "lewdness," "assignation" and "prostitution," as used in the act, signify illicit sexual acts or conduct amounting to or involving lewdness.[16] The words are not synonymous. The word "lewdness" is the most comprehensive of the three, as it embraces all other immoral or degenerate conduct or conversation between persons of opposite sexes,[17] and may

14. People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454; People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812; following cases from other jurisdictions. As to due process in general, see CONSTITUTIONAL LAW, vol. 5, p. 879.

15. People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454, referring to cases from other jurisdictions.

16. People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264.

17. People v. Bay Side Land Co., 32 Cal. App. Dec. 627, 191 Pac. 994.

or may not include acts of prostitution and assignation.[18] While a single act of assignation or prostitution may not constitute a nuisance under the provisions of the law, the deductions to be drawn from such act, when considered in connection with all the attendant circumstances, may properly form the basis for finding that the practice is habitual.[19]

Nature of proceeding.—A suit to abate a nuisance under the Red-light Abatement Act is a civil proceeding;[20] that is to say, an equitable proceeding to abate a nuisance as distinct from a criminal prosecution for the crime of maintaining a nuisance.[1] Because of this it follows that neither the constitution nor the statute requires the submission of the issues in the suit to a jury.[2] The action is also one in rem as well as in personam, being directed both against the property constituting the nuisance and against the persons maintaining it.[3]

§ 7. Parties.—The Abatement Act authorizes the institution of the action by the district attorney of the county in the name of the people, or by an individual citizen in his own name. This provision is valid, and an individual citizen may maintain the action in his own name without a showing that he is specially damaged,[4] and without a

18. People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264.

19. People v. Smith, 32 Cal. App. Dec. 630, 191 Pac. 996.

20. People v. Arcega, 33 Cal. App. Dec. 129, 193 Pac. 268; People v. Burch, 46 Cal. App. 391, 189 Pac. 716; People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454; People v. Macy, 43 Cal. App. 479, 184 Pac. 1008.

1. People v. Gifford, 36 Cal. App. Dec. 127, 201 Pac. 469; People v. Peterson, 45 Cal. App. 457, 187 Pac. 1079.

2. People v. McCaddon, 32 Cal. App. Dec. 1031, 192 Pac. 325; People v. Peterson, 45 Cal. App. 457, 187 Pac. 1079, quoting from State v. Gilbert, 126 Minn. 95, 5 A. L. R. 1449, 147 N. W. 953. See JURY.

3. People v. Gifford, 36 Cal. App. Dec. 127, 201 Pac. 469; People v. Dillman, 37 Cal. App. 415, 174 Pac. 951; People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812. See infra, § 14.

4. People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454. Compare § 5, supra, as to rule in the absence of statute.

bond or other indemnity.[5] Although the Abatement Act provides for the removal and sale of all the personal property used in the maintenance of the nuisance and for the effectual closing for one year of the building or place unless sooner released in the manner provided by law, this fact does not make the proceeding a "prosecution" within the meaning of that provision of the constitution requiring all prosecutions to be conducted in the name of the people of the state.[6]

The Abatement Act contemplates that the owner and the occupant of the building in question shall be made parties to the action to afford them an opportunity to meet the accusation and to protect their property interests. Yet there is nothing in the relationship existing between the owner and the tenant to prevent a court from dismissing the action as to the latter and proceeding against the former alone.[7]

§ 8. Complaint.—While a complaint under the Abatement Act must, of course, allege a cause of action for relief under the statute,[8] it is not necessary to charge the commission of any specific acts constituting the alleged nuisance. It is sufficient in this respect to allege that the premises "were and now are used for the purposes of lewdness, assignation and prostitution, and upon said premises acts of lewdness, assignation and prostitution were held and did occur, and said premises were and now are a nuisance." This allegation is not objectionable as being an allegation of a legal conclusion,[9] or as being in-

5. People v. Feraud, 45 Cal. App. 765, 188 Pac. 843.

6. People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454.

7. People v. Gifford, 36 Cal. App. Dec. 127, 201 Pac. 469.

8. See People v. McCaddon, 32 Cal. App. Dec. 1031, 192 Pac. 325, holding the complaint set forth was not vulnerable to the demurrers interposed. But what demurrers were interposed is not disclosed by the case.

9. People v. Miller, 34 Cal. App. Dec. 383, 196 Pac. 283; People v Arcega, 33 Cal. App. Dec. 129, 193 Pac. 268; People v. Bay Side Land Co., 32 Cal. App. Dec. 627, 191 Pac.

definite and ambiguous, or as improperly stating several causes of action in one count. With reference to the second objection named, while it is true that the words "lewdness," "prostitution" and "assignation" may be used in different senses according to the connection in which they are employed, yet, inasmuch as the complaint charges a nuisance under the Abatement Act, the terms must be understood to mean precisely what they were intended to signify when inserted in the statute.[10] The answer to the third objection lies in the fact that the action is not one for the abatement of prostitution, or of assignation, or of lewdness, but one for the abatement of a public nuisance committed or maintained by the habitual practicing in a building or in or on any premises, of acts of prostitution or assignation or lewdness.[11] Where the premises in question are in the possession of a tenant, it is not necessary to allege that the owner either permits or maintains the nuisance.[12] In accordance with the general rules regarding amendments to pleadings, an amendment correcting a description of the property in question may be allowed.[13]

§ 9. Abatement of Nuisance by Parties as a Defense.—The general rule, that an action to abate a nuisance cannot be maintained if prior to its commencement the nuisance was suppressed by the parties charged with maintaining it, is applicable to cases arising under the Red-light Abatement Act.[14] Of course, a mere sham abatement of the nuisance prior to action would not constitute a defense. The suppression of the nuisance must have been

994; People v. Burch, 46 Cal. App. 391, 189 Pac. 716; People v. Laine, 41 Cal. App. 345, 182 Pac. 986.

10. People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264.

11. People v. Burch, 46 Cal. App. 391, 189 Pac. 716; People v. Laine, 41 Cal. App. 345, 182 Pac. 986.

12. People v. Peterson, 45 Cal. App. 457, 187 Pac. 1079.

13. People v. Gifford, 36 Cal. App. Dec. 127, 201 Pac. 469. See PLEADING.

14. People v. Goddard, 32 Cal. App. Dec. 433, 191 Pac. 1012; People v. Dillman, 37 Cal. App. 415, 174 Pac. 951. See NUISANCE.

in good faith, with the intention that the nuisance shall remain abated for all time. But where the question whether to enjoin the use of a building for any purpose for the period of one year turns on the proposition of good faith, a finding of the want thereof should be supported by evidence clear, satisfactory and convincing.[15] The mere fact, however, that persons who have not been upon the premises after they were raided by the authorities testify that so far as they knew no acts of lewdness were practiced in the building after the raid, does not require the court to find that the nuisance has been abated.[16]

§ 10. Evidence Generally.—In an action under the Abatement Act, it must be shown that the nuisance existed at the time of the commencement of the action.[17] But inasmuch as it is practically impossible in most cases to show the prohibited acts were practiced in a building at the instant a complaint is filed, it should be sufficient to show the performance of those acts at a date prior to the filing of the complaint, and then rely upon the presumption of the continuance of things once shown to exist.[18] This presumption, however, may be overcome by evidence showing the abatement of the nuisance before the action was brought.[19]

Admissibility.—While considerable latitude is allowed the people in proof of a case arising under the Abatement Act, there is no legal justification for a radical departure from the long established rules of evidence. On the contrary, it has been said that in view of the severity of the penalties which may be imposed, the court should be especially careful in the trial of such a case to recognize and apply those substantial forms of procedural law which

15. People v. Goddard, 32 Cal. App. Dec. 433, 191 Pac. 1012.

16. People v. Dillman, 37 Cal. App. 415, 174 Pac. 951.

17. See supra, § 9.

18. People v. Macy, 43 Cal. App. 479, 184 Pac. 1008.

19. People v. Goddard, 32 Cal. App. Dec. 433, 191 Pac. 1012. See supra, § 9.

are intended to protect alike the rights of individuals and those of the public.[20] It is undoubted that a case founded upon the Abatement Act may, like any other case or any other ultimate fact, be established by circumstantial as well as by direct evidence.[1] It is proper to show the acts and conduct of the inmates of the place or building involved.[2] For example, the sale of intoxicating liquors on the premises and the use thereof by female as well as male frequenters of the place may be shown, as this is some proof of the character of the place and that lewdness was practiced therein.[3]

So also the words or language of such inmates may be shown where they constitute verbal acts.[4] But a declaration of an inmate as to his purpose in coming there which is purely hearsay is inadmissible.[5] It is error to receive evidence of conduct elsewhere than upon the premises involved in the suit. Thus, although witnesses upon the premises in question make an assignation to repair to another place where rooms might

20. People v. Burch, 46 Cal. App. 391, 189 Pac. 716; People v. Dillman, 37 Cal. App. 415, 174 Pac. 951.

1. People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264. See EVIDENCE. In the following cases the evidence was held sufficient to justify the decision: People v. Miller, 34 Cal. App. Dec. 383, 196 Pac. 283; People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264 (evidence of lewdness); People v. Smith, 32 Cal. App. Dec. 630, 191 Pac. 996; People v. Bay Side Land Co., 32 Cal. App. Dec. 627, 191 Pac. 994; People v. Macy, 43 Cal. App. 479, 184 Pac. 1008; People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812.

2. People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264. See In re Selowsky, 38 Cal. App. 569, 177 Pac. 301, holding that the act of a female in the house in question in soliciting a person of the opposite sex to have sexual relations with her at a specified price is an act of lewdness, and is evidence tending to show that the building was carried on as a place of prostitution or assignation.

3. People v. Burch, 46 Cal. App. 391, 189 Pac. 716; People v. Laine, 41 Cal. App. 345, 182 Pac. 986 (holding also that evidence that the defendant was selling intoxicating liquor without a license was inadmissible).

4. People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264. See EVIDENCE.

5. People v. Dillman, 37 Cal. App. 415, 174 Pac. 951.

be obtained, evidence as to what transpired at the latter place cannot be received.[6]

§ 11. Evidence of Reputation.—The Abatement Act provides that "evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance."[7] It has been stated that this provision would seem to imply that such evidence may be of itself sufficient to prove the character of the house.[8] However this may be, it is permissible under this provision to introduce evidence of the reputation of the place in question existing in surrounding localities from which it draws patronage.[9] But it is probable that this rule does not go so far as to permit a stranger to the community entering into it with special bias to testify as to his opinion of the reputation of the premises, based upon an interview with a limited number of persons in the community, possibly equally as prejudiced as himself.[10]

§ 12. Evidence of Detectives and Investigators.—The evidence of a detective or investigator is admissible where the witness did not solicit any of the acts testified to but merely relates to the actions of other inmates of the building,[11] and inasmuch as this is not a criminal proceeding, it has been stated that even if such inducement had been offered the evidence would be admissible for the purpose of showing that the building was at the time in question used for the purposes alleged, and that the persons in charge of it were allowing such use. At all events, the evidence is admissible where the investigators resorted

6. People v. Bay Side Land Co., 32 Cal. App. Dec. 627, 191 Pac. 994.

7. Act April 7, 1913; Stats. 1913, p. 20.

8. People v. Macy, 43 Cal. App. 479, 184 Pac. 1008. See supra, § 4.

9. People v. Bay Side Land Co., 32 Cal. App. Dec. 627, 191 Pac. 994.

10. See People v. Burch, 46 Cal. App. 391, 189 Pac. 716, quoting Tingley v. Times-Mirror Co., 151 Cal. 1, 89 Pac. 1097, as to the rule as to reputation of persons, but not deciding whether it is applicable to reputation of buildings.

11. People v. Bay Side Land Co., 32 Cal. App. Dec. 627, 191 Pac. 994.

to artifice and strategy and merely placed themselves in an attitude of willingness to participate in the commission of an immoral and illegal act in order to obtain evidence of the character of the house.[12] The testimony of such witnesses must be considered and its evidentiary value measured by the trier of facts by the same common tests applicable to testimony of other witnesses. Their testimony is not analogous to that of accomplices and may of itself furnish sufficient evidence on which to predicate a judgment.[13]

§ 13. **Findings.**—As in all other civil cases, there should be a direct finding upon every fact vital to the judgment, and legal conclusions in the findings should be avoided where direct findings can be made. While there should be a direct finding that the alleged nuisance existed at the time of the filing of the complaint, this is not always necessary.[14] When it is found that the building in question was used for prohibited purposes down to a certain date prior to the filing of the complaint, a finding that the building was and now is a nuisance, although in form a conclusion of law, will be considered as a finding of an ultimate fact. Although this form of finding is not to be approved it will suffice if there is evidence, actual or presumptive, that the nuisance did exist at the time the complaint was filed.[15] A different situation seems to be presented where the evidence discloses that the nuisance was abated before the commencement, and the court so finds. In that case it has been held that the latter finding and the finding that the building "is now a nuisance"

12. People v. Macy, 43 Cal. App. 479, 184 Pac. 1008.

13. People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264. As to who are accomplices, see CRIMINAL LAW, vol. 8, p. 174.

14. See People v. Burch, 46 Cal. App. 391, 189 Pac. 716, holding the findings are sufficient where the court finds that acts of lewdness were practiced on designated dates prior to and subsequent to the filing of the complaint, and also found generally as to the commission of acts of lewdness.

15. People v. Arcega, 33 Cal. App. Dec. 129, 193 Pac. 268.

would present such an irreconcilable conflict that a judgment predicated thereon could not be upheld.[16] Since, as will be shown, knowledge in the owner of leased premises is unnecessary to authorize the abatement of the nuisance, any issue raised as to such knowledge is immaterial, and it is not necessary for the court to find thereon.[17]

§ 14. Judgment.—When the existence of the nuisance is established, the court is authorized by the Abatement Act to grant a perpetual injunction against its maintenance and to enter an order of abatement directing the removal and sale of all movable property used in conducting the nuisance, and the effectual closing of the building or place for any purpose for one year unless sooner released as therein provided. The court may grant such relief, though the owner of the property may have had no knowledge that a nuisance was being conducted on the premises.[18] In so far as the abatement order is concerned the action is in rem, and while the owner having no knowledge of the character of the business carried on in his building might not be personally liable for costs, the building and furniture may nevertheless be proceeded against and subjected to the forfeitures prescribed.[19] And so also with reference to the injunctive order, the statute makes no distinction between owners having knowledge of the kind of business conducted on their premises and those not so informed. A decree enjoining nonconsenting owners

16. People v. Goddard, 32 Cal. App. Dec. 433, 191 Pac. 1012. The district court of appeals in this case held as indicated by the text, and also gave another reason for reversing the case, but the supreme court in denying a rehearing said in its opinion the reversal on the latter ground was proper.

17. People v. Peterson, 45 Cal. App. 457, 187 Pac. 1079. See infra, § 14.

18. People v. McCaddon, 32 Cal. App. Dec. 1031, 192 Pac. 325; People v. Bay Side Land Co., 32 Cal. App. Dec. 627, 191 Pac. 994.

19. People v. Peterson, 45 Cal. App. 457, 187 Pac. 1079; People v. Dillman, 37 Cal. App. 415, 174 Pac. 951; People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454; People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812.

from maintaining the nuisance upon their premises adjudges nothing as against them which is not a duty, per se, resting upon all the people of the state.[20] Besides, it has been stated that an owner of property is presumed to know the business conducted thereon,[1] and that the knowledge or gross negligence of the employees upon the premises where lewd acts are committed is imputed to the proprietor.[2] It is not necessary, however, that the judgment contain an order of abatement. It is true that the statute specifically directs that it shall contain such an order. But, as has been suggested, if the owner of the premises is completely ignorant of the use of the property and opposed to any immoral use thereof, an abatement order would not only serve no useful purpose but would work a positive injustice.[3] When a court orders an abatement of the nuisance, it is not required in its judgment to designate or segregate with particularity the portions of an entire establishment which constitute the nuisance. For example, where a building is operated as a cafe and hotel under one management, the court may close the entire building, although no acts of lewdness are shown to have occurred in the cafe or kitchen.[4]

§ 15. Injunction and Contempt Proceedings.—The Redlight Abatement Act provides that

"Whenever the existence of such nuisance is shown in such action to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court

20. People v. Peterson, 45 Cal. App. 457, 187 Pac. 1079; People v. Dillman, 37 Cal. App. 415, 174 Pac. 951.

1. People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812.

2. People v. Bay Side Land Co., 32 Cal. App. Dec. 627, 191 Pac. 994.

3. Selowsky v. Superior Court, 180 Cal. 404, 181 Pac. 652, per Lennon, J.; In re Selowsky, 38 Cal. App. 569, 177 Pac. 301, quoted with approval in Holmes v. United States, 269 Fed. 489. See also People v. Dillman, 37 Cal. App. 415, 174 Pac. 951, holding that a decree enjoining the use of the real property for unlawful purposes without ordering an abatement is not prejudicial as clouding the title to the property.

4. People v. Smith, 32 Cal. App. Dec. 630, 191 Pac. 996.

shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance."[5]

It also authorizes a perpetual injunction upon the establishment of the existence of the nuisance after a trial of the action,[6] and then provides that a violation "of any injunction or order expressly provided for" shall be punished as a contempt of court by a fine or imprisonment or both, specifying the amount of one and the duration of the other. The latter provision, of course, includes the preliminary as well as the permanent injunction. The fact that the penalty fixed by this section differs from and is more severe than the penalty authorized for contempts generally does not affect its validity.[7]

As a violation of an injunction or of orders authorized by the Abatement Act constitutes a constructive contempt, it follows that the proceeding upon such violation must be inaugurated by the filing of an affidavit or affidavits reciting the facts constituting the contempt. The affidavit need not be any more specific in its averments than a complaint or information charging a crime. Since a complaint charging the keeping of a house of ill fame need not allege the particular acts lewdness, assignation or prostitution, it follows that the affidavit need not do so.[8] So also the findings of the court need not detail any specific acts.[9]

§ 16. Sale of Property—Costs and Supersedeas.—Sections 7 and 8 of the Abatement Act provide that an order of abatement shall direct the removal and sale of all movable property used in conducting the nuisance, the proceeds of which, after certain other payments, are to be

5. Act April 7, 1913; Stats. 1913, p. 20, subd. 4.

6. Selowsky v. Superior Court, 180 Cal. 404, 181 Pac. 652; In re Selowsky, 38 Cal. App. 569, 177 Pac. 301. See supra, § 14.

7. See CONTEMPT, vol. 5, p. 912.

8. Selowsky v. Superior Court, 180 Cal. 404, 181 Pac. 652; In re Selowsky, 38 Cal. App. 569, 177 Pac. 301. See supra, § 4.

9. Selowsky v. Superior Court, 180 Cal. 404, 181 Pac. 652.

applied "to the payment of plaintiff's costs in such action." The costs contemplated by this provision include only such costs as are ordinarily allowed in an equitable proceeding, and do not include the costs incurred by the prevailing party for his own benefit in the preparation of his case. Nor do they include the cost of placing guards in charge of the premises pending suit, as a court is not authorized to make such an order.[10]

Supersedeas.—While the perfecting of an appeal from a judgment for the people in an action under the Abatement Act will not stay its force so far as it enjoins the use of the premises for lewd purposes, it will stay the judgment so far as it directs the removal and sale of persons and personal property on the premises.[11] In case of a violation of such stay, the appellant may apply for a writ of supersedeas, although he has not procured a release of the property in the manner provided in section 9 of the Abatement Act. The latter section does not authorize a trial court to restrain the sale of the property pending the appeal and has nothing to do with an appellant contending he has been improperly found guilty of maintaining a nuisance.[12]

§ 17. **Cancellation of Order of Abatement.**—Section 9 of the Red-light Abatement Act (Stats. 1913, p. 22), provides as follows:

"If the owner of the building or place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court, with sureties, to be approved by the court or judge, condi-

10. People v. Feraud, 45 Cal. App. 765, 188 Pac. 843.

11. People v. Laine, 177 Cal. 742, 171 Pac. 941. See APPEAL AND ERROR, vol. 2, pp. 439, 441.

12. People v. Laine, 177 Cal. 742, 171 Pac. 941. See infra, § 17, where section 9 of the Abatement Act is quoted. See APPEAL AND ERROR, vol. 2, p. 480, as to remedies upon violation of a statutory supersedeas.

tioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied of his good faith, order the premises closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. The release of the property, under the provisions of this section, shall not release it from any judgment, lien, penalty or liability to which it may be subject by law."

While the word "may" is sometimes construed to mean "must," still in view of the purposes of the act and the character of the evil to be dealt with, it is evident that the legislature intended by this section to vest discretion in the trial court in granting or refusing an application to reopen the premises. This follows also from the provision that the court must be satisfied of the good faith of the owner. To justify a demand for cancellation the owner must make the showing contemplated by the statute. It is difficult, if not impossible, to lay down any rule as to the proof he must make to satisfy the court of his good faith, but he should at least show that he is conducting a lawful business in a lawful manner.[13]

13. Ryan v. Superior Court, 32 Cal. App. Dec. 1113, 192 Pac. 1036.

(J. O. T.)

DISTRIBUTION.

See EXECUTORS AND ADMINISTRATORS; DESCENT AND DISTRIBUTION.

DISTRICT AND PROSECUTING ATTORNEYS.

I. Introductory.
II. Qualifications and Tenure.
III. Powers and Duties.
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I. Introductory.

§ 1. Definition and Origin—Scope of Article.—A district attorney is a public officer,[1] who in the discharge of his duties performs two quite distinct functions. He is at once the law officer of the county[2] and the public prosecutor on behalf of the state in his county.[3] His principal duty is as a prosecutor, and because of this fact he is often called a prosecuting attorney. This function was originally performed by the attorney general, and for that reason the office of district attorney is said to have been carved out of that of attorney general.[4] However, the offices are now distinct, except that the attorney general has a general supervisory control over district attorneys, and must assist them in the discharge of their duties when

1. Fleming v. Hance, 153 Cal. 162, 94 Pac. 620. See Public Officers.

2. County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483. See infra, § 9.

3. Pol. Code, § 4153; Singh v. Superior Court, 44 Cal. App. 64, 185 Pac. 985. See infra, § 13 et seq.

4. 22 Ruling Case Law, 87.

required by the public service.[5] So also while the office is ordinarily separate it may be consolidated with that of coroner by ordinance.[6]

This article treats of the nature of the office, the tenure, rights, powers, duties and compensation of the district attorneys. It also considers the rights and duties of his deputies and assistants. Attorneys at law, generally, and attorneys general are treated elsewhere.[7]

§ 2. Nature of Office.—The office of district attorney is a creature of the statute pursuant to express mandate of the constitution.[8] The district attorney is a civil executive officer.[9] While there are some decisions in other jurisdictions which say that a district attorney is a judicial officer, this proposition cannot be assented to, so far as California is concerned: In the first place, it is to be noted that the legislature, in general language contained in section 343 of the Political Code, designates a district attorney as a "civil executive officer." In the second place, there is no duty among those imposed by law on a district attorney which is of a judicial nature, except perhaps the duty of giving legal opinions to other county officers with respect to their official duties, which, strictly speaking, is not judicial, for, in performing such a duty, he does no more than the lawyer engaged in private practice does when advising his clients.[10]

5. See Attorney General, vol. 3, p. 564.

6. Pol. Code, § 4017. See Coroners, vol. 6, p. 542. See Counties, vol. 7, p. 528, as to the consolidation of county offices generally.

7. See Attorney General, vol. 3, p. 559 et seq.; Attorneys at Law, vol. 3, p. 576 et seq.

8. Const., art. XI, § 5; Fleming v. Hance, 153 Cal. 162, 94 Pac. 620; People v. Central Pac. R. R. Co., 43 Cal. 398 (citing Const. 1849, art. VI, § 11); People v. Brown, 16 Cal. 441 (citing Const. 1849, art. VI, § 7). See County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483, so holding with reference to boards of supervisors.

9. County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125; Singh v. Superior Court, 44 Cal. App. 64, 185 Pac. 985.

10. Ex parte Sternes, 82 Cal. 245, 23 Pac. 38; Singh v. Superior Court, 44 Cal. App. 64, 185 Pac. 985, per Hart, J. (holding a district attorney to be an "executive" officer

§ 3. Relation of Office to County and State.—The political Code provides that the officers of a county include among others a district attorney.[11] Yet while it is true that a district attorney is a county officer in at least a geographical sense—that is to say, that the exercise of his powers as such is limited territorially to the county for which he has been elected—considering the nature and purposes of county governments, he is also in a sense a state officer, or, perhaps it would be more correct to say, a part of a political organization which is itself an agent of the state.[12] Thus the more important duties of a district attorney are the prosecution of criminal cases, which are prosecuted, not in the name of the county or the people of the county, but in the name of the people of the state.[13] Also the legislature, in section 771 of the Penal Code, seems to have proceeded upon the theory that the district attorney, in exercising his powers as such, acts for the state, when it provided that in case of an accusation against a district attorney the judge of the superior court must appoint someone to act as prosecuting officer in the matter, "or place the accusation in the hands of the district attorney of an adjoining county, and require him to conduct the proceedings."[14]

§ 4. Relation to Court.—A district or prosecuting attorney is in no sense a part of the court. Attorneys are frequently said to be officers of the court, in the sense that

within the meaning of Pen. Code, § 67, making the bribery of executive officers a public offense).

11. Pol. Code, § 4013; Reid v. Superior Court, 44 Cal. App. 349, 186 Pac. 634; People v. Marsh, 30 Cal. 424, 159 Pac. 191, treating a district attorney as a county officer within the meaning of § 995, Pol. Code, providing for the resignation of public officers.

12. Singh v. Superior Court, 44 Cal. App. 64, 185 Pac. 985, per Hart, J. See COUNTIES, vol. 7, p. 414, as to the nature and purposes of county governments.

13. County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483; Singh v. Superior Court, 44 Cal. App. 64, 185 Pac. 985.

14. Singh v. Superior Court, 44 Cal. App. 64, 185 Pac. 985, per Hart, J.

they have the privilege of presenting the causes of their clients before the court, and are subject to its control in the performance of their duties. To this extent, all attorneys practicing before a court, including district attorneys, are its officers, but they are not, merely by reason of being licensed to practice in the courts, public officers.[15] The prosecuting attorney is, it is true, a public officer, but the public nature of his employment results from the fact that he represents the people by whose authority and whose name all prosecutions must be conducted. It is his relation to his client, not to the court, that makes him a public officer. He does not perform a function of the court to any greater extent than his adversary does.[16]

§ 5. **Importance of Office.**—The district attorney is one of the most important of public officials. His powers are very extensive. In his keeping is intrusted to a large degree the liberty of the individual, the good order of society, and the safety of the community. His natural influence with the grand jury, and the confidence commonly reposed in his recommendations by committing magistrates and judges, afford to the unscrupulous, the weak or the wicked incumbent of the office vast opportunity to oppress the innocent and to shield the guilty, to harass his enemies and to protect his friends, and to make the interest of the public subservient to his personal desires, his individual ambitions and his private advantage. While, on the one hand, a public prosecutor should not employ his office or his powers in the persecution of personal enemies or for the gratification of private animosities, on the other hand he should not be so lax in the administration of his trust that the criminally minded become contemptuous of the law he is supposed to represent.

15. Fleming v. Hance, 153 Cal. 162, 94 Pac. 620; San Luis Obispo County v. Hendricks, 71 Cal. 242, 11 Pac. 682; People v. Ruef, 14 Cal. App. 576, 114 Pac. 48, 54. See Attorneys at Law, vol. 3, p. 601.

16. Fleming v. Hance, 153 Cal. 162, 94 Pac. 620. And see Const., art. VI, § 20.

He is attorney for the people, and some allowance must be made for the zeal which is the natural result of the prosecution, yet he should always be mindful of the rights of a defendant and should not run counter to the plain provisions of law governing criminal trials,[17] for he, no less than the judge on the bench, represents the majesty of the law. And it is largely through him that public confidence in the courts and in the administration of justice is won or lost. Powers so great and opportunities so important impose responsibilities correspondingly grave.

II. QUALIFICATIONS AND TENURE.

§ 6. In General.—The constitution requires the legislature to provide, by general and uniform laws, for the election or appointment, in the several counties, of district attorneys and to prescribe their duties and fix their terms of office.[18] Accordingly the legislature has provided that all elective county officers shall be elected at the general election at which the governor is elected, and shall hold office until their successors are elected and qualified.[19] The district attorney, therefore, holds office for the same term as the governor.[20]

Qualifications and eligibility.—While formerly it was not required that one should be licensed to practice law before he could become eligible to the office of district attorney,[1]

17. See CRIMINAL LAW, vol. 8, p. 253.

18. Const., art. XI, § 5. Fleming v. Hance, 153 Cal. 162, 94 Pac. 620; People v. Central Pac. R. R. Co., 43 Cal. 398. See People v. Brown, 16 Cal. 441, holding that the act of 1851 (Wood's Dig., § 64), and the act of 1855 (Wood's Dig. 561, §§ 46 and 49), were not repealed by the act of 1856 consolidating the city and county of San Francisco.

19. Pol. Code, § 4021; Reid v. Superior Court, 44 Cal. App. 349, 186 Pac. 634; Satterwhite v. Garrison, 34 Cal. App. 734, 168 Pac. 1053.

20. Reid v. Superior Court, 44 Cal. App. 349, 186 Pac. 634.

1. People v. Dorsey, 32 Cal. 296, containing interesting references to eminent jurists who were not lawyers, much less licensed attorneys.

the rule now is that no one is eligible unless he possesses the qualifications prescribed for county officers generally,[2] and unless he has also been admitted to practice in the supreme court of the state of California.[3] On qualifying a district attorney is required to give an official bond in the amount prescribed by the board of supervisors.[4]

§ 7. Removal and Resignation.—If a district attorney has been guilty of willful or corrupt misconduct in office, the grand jury may present an accusation in writing against him, as in the case of other district, county, township or municipal officers.[5] The same proceedings may be had upon such accusation as in other cases, "except that the accusation must be delivered by the foreman of the grand jury to the clerk, and by him to a judge of the superior court of the county, who must thereupon appoint someone to act as prosecuting officer in the matter, or place the accusation in the hands of the district attorney of an adjoining county, and require him to conduct the proceedings."[6] This language is mandatory, and if the judge should elect to order a district attorney of an adjoining county to prosecute the accusation, that officer would be compelled to perform the duty.[7] If the judge appoints an attorney to prosecute the proceedings, the services rendered him constitute a county charge, under subdivision 3, section 4307, of the Political Code, making a county charge of "other services in relation to criminal proceedings for which no specific compensation is pre-

2. See Counties, vol. 7, p. 426, as to qualifications of county officers generally.

3. Pol. Code, § 4023.

4. Pol. Code, § 4022.

5. Pen. Code, §§ 758, 771. See Reid v. Superior Court, 44 Cal. App. 349, 186 Pac. 634, as to sufficiency of an accusation against district attorney charging the extortion of money before instituting criminal proceedings, and as to the sufficiency of the judgment of removal in reciting the causes of removal in compliance with Pen. Code, § 769. As to the sufficiency of the accusation generally, see Public Officers.

6. Pen. Code, § 771.

7. Singh v. Superior Court, 44 Cal. App. 64, 185 Pac. 985; Gibson v. Sacramento County, 37 Cal. App. 523, 174 Pac. 935.

scribed by law."[8] A district attorney, who has been removed from office for alleged misconduct pursuant to the provisions of the Penal Code, above referred to, is not subject to summary procedure for disbarment under section 288 of the Code of Civil Procedure; but this does not preclude proceedings for disbarment on account of matters alleged in the accusation preferred against him in the removal proceedings, but such disbarment proceedings would necessarily be based on a verified accusation in writing, stating the matters charged, and would entail notice and trial.[9]

Resignation.—The resignation of the district attorney which is in writing and in accordance with the statute, and by its terms to take effect upon delivery to the clerk of the board of supervisors, becomes effective immediately upon delivery to such clerk, though it has not been accepted by the board of supervisors; and an attempt thereafter to withdraw it is of no effect.[10]

III. Powers and Duties.

In General.

§ 8. Enumeration of Duties—Presumption.—The general duties of the district attorney are defined in the Political Code.[11] While, as has already been stated, his most

8. Gibson v. County of Sacramento, 37 Cal. App. 523, citing State ex rel. McGrade v. District Court, 52 Mont. 371, 157 Pac. 1157.

9. In re Reid, 182 Cal. 88, 187 Pac. 7. See Attorneys at Law, vol. 3, pp. 737, 740, as to disbarment proceedings generally.

10. People v. Marsh, 30 Cal. App. 424, 159 Pac. 191. See Public Officers, as to resignation from office generally.

11. Pol. Code, §§ 4153–4156b, based in part on the County Government Act 1897, p. 488, §§ 132–134. See Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651 (enumerating duties of district attorney as defined in the County Government Act of 1897). See Higby v. Calaveras County, 18 Cal. 176, decided under the act of April 29, 1851. See Municipal Corporations, as to the powers and duties of city attorneys and city and county attorneys.

important duty is the prosecution of criminal cases,[12] the district attorney is also charged with the prosecution and defense of certain civil actions.[13] He is the legal adviser of the board of supervisors,[14] and of county, district and township officers.[15] He must prepare, without fee, upon request, all the papers and forms necessary for the voting of school bond issues and advise the boards in relation thereto.[16] He is required to deliver receipts for money or property received in his official capacity, and file duplicates thereof with the county treasurer,[17] and must on the first Monday of each month file with the auditor an account, verified by oath, of all moneys received by him in his official capacity during the preceding month, and at the same time pay them over to the county treasurer.[18] In addition to these general duties it is specifically provided that the district attorney must perform such other duties as are required by law.[19] On the other hand, a district attorney is expressly forbidden to present any claim, account or demand for allowance against the county, except for his own services, and from advocating the relief asked on any claim or demand made by another.[20] He cannot, during his incumbency, defend or assist in the defense of, or act as counsel for, any person or persons, association or corporation, accused of any crime in any county or city and county in the state of

12. See supra, § 1; and see infra, § 13 et seq.

13. See infra, § 10, as to his duty in relation to county suits and state suits brought within the county. As to powers and duties under the Red-light Abatement Act, see Disorderly Houses, ante, p. 569.

14. See infra, § 9.

15. Pol. Code, § 4153, subd. 6. As to exception in counties having freeholders' charters providing for county counsel, see Pol. Code, § 4153, subd. 8.

16. Pol. Code, § 4153, subd. 7; Stats. 1921, p. 212. As to exception in counties having freeholders' charters providing for county counsel, see Pol. Code, § 4153, subd. 8.

17. Pol. Code, § 4153, subd. 4.

18. Pol. Code, § 4153, subd. 5.

19. Pol. Code, § 4156a.

20. Pol. Code, § 4155. Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651.

California,[1] or, at any time, assist in the defense of any prosecution formerly carried on by him.[2]

And in counties of the first class district attorneys are not permitted to engage in private practice.[3] Many of the powers and duties of district attorneys are discussed or adverted to in other articles of this work.[4]

Presumption as to performance of duties.—The general rule, that in the absence of any showing to the contrary, it must be presumed that official duty has been properly performed, is applicable to district attorneys.[5]

§ 9. Relation to Board of Supervisors.—Inasmuch as a board of supervisors has power to supervise the official conduct of all county officers,[6] it has control over the district attorneys in the exercise of his functions as the law officer of the county. But since the district attorney in his capacity as a public prosecutor acts by the authority and in the name of the people of the state, he is not subject to control by the board while acting in that capacity. And in case he needs assistance in the prosecution of a criminal case, the board of supervisors has no power to

1. Pol. Code, § 4156b.

2. Pen. Code, § 162.

3. Pol. Code, § 4156b.

4. Bail and Recognizance, vol. 3, pp. 1021, 1072; Coroner, vol. 6, p. 547; Counties, vol. 7, pp. 381, 563; Criminal Law, vol. 8, p. 253; Extradition; Grand Jury; Habeas Corpus; Indictment and Information; Insane Persons; Pardon; Public Officers.

5. Code Civ. Proc., § 1963, subd. 16. County of San Diego v. Utt, 173 Cal. 554, 160 Pac. 657; County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125; San Luis Obispo County v. Hendricks, 71 Cal. 242, 11 Pac. 682; Los Angeles County v. Rindge Co., 35 Cal. App. Dec. 392, 200 Pac. 27; Adamson v. Los Angeles County, 34 Cal. App. Dec. 888, 198 Pac. 52 (holding that in an action by a county for the condemnation of land for a public highway the county counsel, as attorney representing the county, has authority on a motion for a new trial to consent to an order increasing the amount of compensation awarded to the defendant by the verdict of the jury due to an error in computing the amount of required fencing of defendant's land along the roadway); People v. Ciulla, 44 Cal. App. 719, 187 Pac. 46; People v. Burke, 18 Cal. App. 72, 122 Pac. 435; People v. Ruef, 14 Cal. App. 576, 114 Pac. 48, 54. See Public Officers.

6. Counties, vol. 7, p. 455.

employ counsel on behalf of the county, it being the duty of the attorney general to go to his aid.[7]

The district attorney is the legal adviser of the board of supervisors. He must attend their meetings, when required, and must attend and oppose all claims and accounts against the county, when he deems them unjust and illegal. It is so provided in the Political Code,[8] and it is clear from this provision that the board has no power to employ anyone else in that capacity.[9] Any opposition of the district attorney made pursuant to this code section is not controlling upon the discretion of the board to allow the claim opposed.[10] But a different rule exists in the case of claims by supervisors themselves, by virtue of section 4079 of the Political Code.[11]

§ 10. Prosecuting and Defending Civil Actions.—It is provided that the district attorney must "defend all suits brought in his county against the state, or his county wherever brought," and "prosecute all recognizances forfeited in the courts of record, and all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county."[12] Under such a provision it is the duty of the district attorney to prosecute and defend suits in which his county is interested, wherever they are brought,[13] provided, however, the board of supervisors

7. County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483. See supra, § 1. And see Counties, vol. 7, p. 458.

8. Pol. Code, § 4154; Woolwine v. Superior Court, 182 Cal. 388, 188 Pac. 569; County of San Diego v. Utt, 173 Cal. 554, 160 Pac. 657; Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651; Merriam v. Barnum, 116 Cal. 619, 48 Pac. 727.

9. See Counties, vol 7, p. 460.

10. Solano County v. McCudden, 120 Cal. 648, 53 Pac. 213.

11. See Counties, vol. 7, p. 552.

12. Pol. Code, § 4153, subd. 3; Hedges v. Dam, 72 Cal. 520, 14 Pac. 133; Scollay v. County of Butte, 67 Cal. 249, 7 Pac. 661; People v. De Pelanconi, 63 Cal. 409 (action on bail bond); People v. Central Pac. R. R. Co., 43 Cal. 398, construing act of April 29, 1851 (Hitt. Gen. Laws, § 2402). See Pol. Code, § 2956, as to right of district attorney to bring an action upon bond given to immigration commissioner.

13. Buck v. City of Eureka, 109 Cal. 504, 30 L. R. A. 409, 42 Pac.

has not in the exercise of its powers employed other counsel.[14]

The district attorney is the proper person to prosecute an action against the members of a board of supervisors to recover the amount of illegal claims alleged to have been unlawfully allowed and ordered paid by them in their official capacity out of the county treasury,[15] and to bring an action against an assessor for uncollected taxes which should have been collected by him,[16] and to bring an action against a tax collector who refuses or neglects to make payments or settle for taxes as required by law.[17] But where he is not expressly authorized so to do, he cannot bring actions for the recovery of delinquent taxes.[18]

Actions by or against auditor or treasurer.—Except in counties having a freeholders' charter creating the office of county counsel, the district attorney is required, when requested, to defend or prosecute any action brought by or against the auditor or treasurer for the purpose of testing the validity of any act providing for the payment of county funds or funds held in trust by the county in cases where the interest of the county is not adverse.[19] The

243, overruling an expression in Herrington v. Santa Clara County, 44 Cal. 496, to the contrary.

14. See Counties, vol. 7, p. 459.

15. If it be admitted that a taxpayer has the right, even in the absence of an express statutory authority, to prosecute actions of this kind, facts should be alleged showing a refusal or neglect on the part of the proper officer to institute an action. Hedges v. Dam, 72 Cal. 520, 14 Pac. 133.

16. Pol. Code, § 3831.

17. Pol. Code, § 3755. See People v. Love, 25 Cal. 520, construing Revenue Act of May 17, 1861, § 36, Stats. 1861, p. 431.

18. San Diego Co. v. California Southern R. Co., 2 Cal. Unrep. 238, 1 Pac. 897, construing act of April 23, 1880 (Stats. 188, p. 136), and Pol. Code, art. VIII. Compare People v. Central Pac. R. R. Co., 43 Cal. 398, construing act of May 17, 1861 (Hitt. Gen. Laws, § 6188); and holding that the constitution of 1849 allowed the legislature to pass a law directing the district attorney to bring such actions, and that such a law does not interfere with the constitutional duties of the tax collector. See Pol. Code, § 3899, as to authority of attorney general to bring such actions; and see Taxation.

19. Pol. Code, § 4153, subd. 8, Stats. 1921, p. 212. See Woolwine v. Superior Court, 182 Cal. 388, 188 Pac. 569 in which the validity of

controller of state is intrusted with the duty of making settlements with the county treasurers for the moneys received by them and belonging to the state, and where that officer has settled with a county treasurer and allowed him his commissions, it is doubtful if a district attorney has any right to sue for money claimed to be due the state unless he is directed so to do by the controller. But in any event he has no arbitrary power to disturb the settlement, at least without some special showing of facts. If the state is satisfied with the settlement, the district attorney should be.[20]

§ 11. Direction to Bring Action—Control of Case.—It is a well-settled rule that, in all cases except those wherein the district attorney is expressly authorized to maintain a suit without an order from the board of supervisors, he may institute an action only under direction of the board. The statute making it the duty of the district attorney to "prosecute all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county," gives him no right to institute proceedings at will, but merely imposes a duty upon him so to do when directed by competent authority.[1] On the other hand, however, under the provision that

"The district attorney may, and when directed by the board of supervisors must, bring a civil action in the name

this exception was on the ground that it is a special law, but which does not decide the point.

20. People v. Lattimore, 19 Cal. 365. See Pol. Code, § 3878.

1. Ventura County v. Clay, 119 Cal. 213, 51 Pac. 189 (holding that a motion to dismiss an action brought by the district attorney is proper procedure, when the action is brought by him without authority). And see to the same effect, Contra Costa County v. Soto, 138 Cal. 57, 70 Pac. 1019. See People v. Love, 25 Cal. 520, construing Revenue Act of May 17, 1861, § 36 (Stats. 1861, p. 431), and holding the district attorney had power to bring an action against a tax collector of his own volition. See Counties, vol. 7, p. 560. And see Counties, vol. 7, p. 561, as to the authority of the district attorney to institute suit in the name of the county to recover money paid out without authority of law.

of the people of the state of California, to abate a public nuisance in his county,"[2]

a district attorney is empowered to commence and maintain the action without any previous direction of the board of supervisors.[3] Since a district attorney is an attorney at law, he is presumed to be authorized by the proper party to institute the actions he brings, until the contrary is made to appear, and it is not necessary for him to allege his authority in his complaint.[4] As between the board of supervisors and district attorney on the one hand, and an attorney claiming to be special counsel for the county on the other, the former are superior in authority, and have a right to control all proceedings in a case to which the county is a party, at least in the absence of an objection by the attorney general.[5]

After expiration of term.—When the term of office of a district attorney expires it is his duty to hand over papers, etc., connected with his office to his successor, who

2. Pol. Code, § 4156. See to same effect, Code Civ. Proc., § 731; People v. Wing, 147 Cal. 379, 81 Pac. 1103, involving the abatement of tippling-house and gambling-room, and quoting Pol. Code, § 4156. And see NUISANCES.

3. People v. McCue, 150 Cal. 195, 88 Pac. 899 (construing act of March 15, 1899 (Stats. 1899, p. 103), and holding that the fact that other remedies may exist for the abatement of such public nuisances as obstructions of public highways cannot affect the power in this regard conferred upon the district attorney).

4. San Luis Obispo County v. Hendricks, 71 Cal. 242, 11 Pac. 682, holding that the complaint in an action brought by the district attorney to collect a license tax, under an ordinance which provides that the tax collector may direct such suits to be brought, need not allege that the action was brought under an authorization by the tax collector. See ATTORNEYS AT LAW, vol. 3, p. 647.

5. Allen v. County of San Bernardino, 72 Cal. 450, 14 Pac. 18, holding that in the absence of any objection by the attorney general, an appeal by a county from a judgment rendered against it will be dismissed on a motion made by the district attorney of the county, in pursuance of a resolution of its board of supervisors, although an attorney claiming to act as special counsel for the appellant opposes the motion.

is charged with the duty of prosecuting suits for the county.[6]

§ 12. Authority to Incur Expense.—The statute includes among county charges the following:

"The traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county, and in civil actions and proceedings in which the county is interested, and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases, and in civil actions and proceedings and all other matters in which the county is interested."[7]

Under this provision a district attorney has authority to employ detectives at the expense of the county when necessary for the detection of persons guilty of crimes or to obtain evidence of their guilt,[8] and to incur an expense in securing the testimony of an expert in a criminal case.[9] And it has been held that he may, when he deems it necessary, incur a charge for the transcription of testimony for use in a criminal case, without first obtaining an order of the superior court directing the transcription.[10] The statute, however, contemplates only expenses necessarily incurred in connection with the office of the district attorney outside of the performance of the duties required of him by statute. If money has to be paid for taking a

6. Cole v. McKune, 19 Cal. 422.

7. Pol. Code, § 4307, subd. 2, based on County Gov. Act 1897, p. 555, § 228. See Counties, vol. 7, p. 532.

8. Rocca v. Boyle, 166 Cal. 94, Ann. Cas. 1915B, 857, 135 Pac. 34; Langdon v. Koster, 157 Cal. 39, 106 Pac. 209; Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651; Thiel Detective Co. v. Tuolumne Co., 37 Cal. App. 423, 173 Pac. 1120.

9. Victors v. Kelsey, 31 Cal. App. 796, 161 Pac. 1006, holding that the general law fixing the fees of witnesses is not a limitation upon the power given the district attorney by the statute quoted in the text.

10. County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125, holding that Code Civ. Proc., § 274, fixing fees and providing how an allowance shall be paid to a reporter for reporting or for the transcription of testimony, "ordered by the court to be made" is not a limitation upon the power of the district attorney, in incurring an expense for the transcription of testimony to be used by him in a criminal case when he deems it necessary in the prosecution of such a case.

deposition, for the services of an expert, or for detective work the statute makes it a charge against the county. But it does not include charges for the services of a stenographer employed by the district attorney to write letters, pleadings or judgments, in the performance of the duties required of him by law. The district attorney must write his own letters or pay someone to write them for him, in the absence of any law authorizing the paying of a deputy or assistant. And, of course, the statute does not contemplate the purely personal expenses of the district attorney, such as food, clothing and amusements.[11]

In the exercise of the power conferred by the statute just quoted, a district attorney is not required to consult any court or obtain any order therefrom as a prerequisite to his incurring any expense which he may deem proper in the discharge of his duties.[12] Nor is he required to consult the board of supervisors, but the matter is left to his discretion in the first instance.[13] Of course, this discretion is not an arbitrary one. Any claim for such expenses must be presented to the board of supervisors for allowance, and that body reviews the action of the district attorney and determines whether the expense was a necessary one and acts accordingly.[14] The determination of the board that the expense was proper and necessary is conclusive upon the courts. But if the board rejects the claim, the claimant may bring an action thereon as in the case of any other claim against the county.[15] If the treasurer refuses to pay such claim after allowance, the remedy by mandamus is proper.[16]

11. Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651.

12. County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125.

13. Thiel Detective Co. v. Tuolumne Co., 37 Cal. App. 423, 173 Pac. 1120.

14. County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125; Victors v. Kelsey, 31 Cal. App. 796, 161 Pac. 1006.

15. Thiel Detective Co. v. Tuolumne Co., 37 Cal. App. 423, 173 Pac. 1120; Victors v. Kelsey, 31 Cal. App. 796, 161 Pac. 1006. See COUNTIES, vol. 7, p. 549.

16. See COUNTIES, vol. 7, p. 485; MANDAMUS.

Where a claim shows on its face that the expenditure was "authorized and approved by" the district

Under charters.—Under a freeholders' charter providing that a district attorney "shall have all the powers conferred, and shall discharge all the duties imposed upon, the district attorneys of counties by the general laws of the state," he has the same power to incur expenses as is conferred by the general laws.[17] The mere fact that the district attorney has at his call the police force and detective department of the city and county does not render an expenditure unnecessary within the meaning of the statute where it has been expressly authorized by the board of supervisors. In so doing they are the judges of the necessity, and only in a plain case of an abuse of their powers would their judgment be subjected to reversal.[18]

Public Prosecutor.

§ 13. In General.—"The district attorney is the public prosecutor,"[19] and as such he must

"Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that any such offenses have been committed; and for that purpose, when not engaged in criminal proceedings in the superior court, or in civil cases on behalf of the people, must attend upon the magistrates in cases of arrest, when required by them, and attend before and give advice to the grand jury, whenever cases are presented to them for their consideration."[20]

attorney and such claim is made a part of the petition, it is sufficiently averred that the district attorney agreed to pay for the services. Victors v. Kelsey, 31 Cal. App. 796, 161 Pac. 1006.

17. Rocca v. Boyle, 166 Cal. 94, Ann. Cas. 1915B, 857, 135 Pac. 34 (holding also that under section 12 of chapter 3 of article III of the San Francisco charter a claim by a detective employed by the district attorney should be presented to the auditor instead of the board of supervisors); Langdon v. Koster, 157 Cal. 39, 106 Pac. 209. See San Francisco charter, art. V., c. 3, § 2; Stats. 1899, p. 278.

18. Langdon v. Koster, 157 Cal. 39, 106 Pac. 209.

19. Pol. Code, § 4153.

20. Pol. Code, § 4153, subd. 2. Pillsbury v. Brown, 47 Cal. 477.

"Draw all indictments and informations";[1] and "Attend the courts, and conduct, on behalf of the people, all prosecutions for public offenses."[2]

If he has the requisite knowledge, he may swear to the complaint in a criminal case, and the defendant is not deprived of a fair trial because of the fact that he afterwards conducts the trial.[3] So also if he is in a situation to know the facts, he may give testimony in the interest of justice.[4] And it has been held that he is competent to make admissions, upon the trial of a criminal case, which are binding upon the prosecution, rendering the introduction of further proof unnecessary.[5]

§ 14. Duty to Accused Generally.—A public prosecutor represents all the people, of whom every person accused of violating public law is none the less one because he is so accused. He represents the majesty of the law, which stands for the protection of every citizen against the taking of his life, his liberty or his property without its due process. While he should always do his duty, he should

1. Pol. Code, § 4153, subd. 3.

In filing an information the functions of a district attorney are ministerial only. People v. Nogiri, 142 Cal. 596, 76 Pac. 490 (holding that he has no power to file an information for any greater or other offense than that specified in the commitment by the magistrate, though in accordance with the complaint made before the magistrate). Ex parte Sternes, 82 Cal. 245, 23 Pac. 38 (holding that he has no judicial power to inquire into the question of probable cause). See INDICTMENT AND INFORMATION.

2. Pol. Code, § 4153, subd. 1. Fleming v. Hance, 153 Cal. 162, 94 Pac. 620.

3. See CRIMINAL LAW, vol. 7, p. 964. And see in this connection People v. Cole, 127 Cal. 545, 59 Pac. 984 (holding that a motion will not lie to set aside an information for murder after the defendant has been held to answer as the result of a preliminary examination, on the ground that the district attorney who filed the complaint had no personal knowledge of the facts of the homicide. Any imperfections in the complaint are cured where the evidence taken by the magistrate warrants an order holding the defendant to answer).

4. People v. Hamberg, 84 Cal. 468, 24 Pac. 298. See WITNESSES. And see note, 9 A. L. R. 1109, as to privilege of communications made to prosecuting officers.

5. People v. Robles, 34 Cal. 591.

always do it fairly and justly and should not permit the great power with which he is clothed to be converted into an instrument of persecution.[6] He owes to a defendant as solemn a duty of fairness as he is bound to give the state full measure of earnestness and fervor in the performance of his official obligations.[7] Indeed, it is his sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Hence it is said that he should be as solicitous of the protection of the rights of a citizen or other person on trial for his life or his liberty as the judge who presides at the trial, and it is obviously an egregiously erroneous notion if he conceives it to be his duty to convict every person against whom a crime has been charged, regardless of whether he is or is not guilty or of whether the proof he is able to produce against one so accused is or is not sufficient to justify his conviction. And it is equally a mistake for him to suppose that it is proper for him to present to the jury anything but strictly legal evidence in support of the charge, or that it is within the sphere of legitimate argument to prejudice the standing of the accused by insinuating that some fact bearing strongly against the accused which has not been proved by proper evidence in reality exists. He should remember that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust,[8-9] and that, "while zeal is a very excellent quality in a prosecuting officer, it, perforce, becomes a menace rather than an advantage to a successful prosecution of a criminal case when it succeeds in usurping the place of sound and sane judgment."[10] The district attorney owes it not only to his own reputation, but to the

6. People v. Hail, 25 Cal. App. 342, 143 Pac. 803; People v. Ruef, 14 Cal. App. 576, 114 Pac. 48, 54. See Criminal Law, vol. 8, p. 253.

7. People v. Tufts, 167 Cal. 266, 139 Pac. 78.

8-9. People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719.

10. People v. Maughs, 8 Cal. App. 107, 96 Pac. 407.

court and the people whom he represents, to avoid all possible error in the conduct of cases.[11]

§ 15. Summoning Hostile Witnesses and Divulging Private Information.—While it is the sworn duty of a district attorney to prosecute fairly and impartially persons accused of crime, yet there is, and must be, committed to his judgment many matters of discretion in the discharge of his duties as a public official. "When he proceeds with the trial of a criminal case, it must be assumed that his investigation of the facts has persuaded him of the guilt of the accused. He is under no legal obligation to subpoena, and much less to introduce, as a witness for the people a person whose testimony he knows will be adverse to the theory of the prosecution, for, having been convinced of the guilt of the accused, it would be widely at variance with the policy of any sensible lawyer to introduce proof destructive of his case which he may perhaps believe has been conceived in a misapprehension of the facts or in a desire to exonerate the defendant through false testimony." And although he has caused a subpoena to be issued for a witness, he may withdraw the subpoena if he decides he does not need or require the witness.[12] So, also, while a district attorney should always be fair, and use only legal means to secure a conviction, yet he is the attorney for the people, and is not required to divulge to his adversary the private information he has, either in the way of evidence or information concerning jurors. He is not required to submit a report in his office on the qualification of a juror to the inspection of the defendant's attorney, who does not know its contents, and is attempting by an improper "fishing" examination to discover the same. It is the province of the district attorney, as well as the attorney for the defendant, to find out in a legitimate way

11. People v. Wright, 4 Cal. App. 704, 89 Pac. 364.

12. People v. Johnson, 13 Cal. App. 776, 110 Pac. 965, per Hart, J. See CRIMINAL LAW, vol. 7, p. 809.

all he can concerning prospective jurors, and it must be presumed that the district attorney has used only proper means of obtaining such information. In any event, it cannot be held reversible error for the court to refuse to compel the district attorney to show to the attorney for the defendant a paper the contents of which is a matter of mere conjecture.[13]

§ 16. Nolle Prosequi.—At common law the power of entering a nolle prosequi in criminal cases was lodged exclusively in the attorney general, and in the gradual development of criminal procedure in the United States, this particular right of the prosecuting attorney has remained in some jurisdictions.[14] In California, however, it is expressly provided that

"The entry of a nolle prosequi is abolished, and neither the attorney general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in section 1385 of the Penal Code."[15]

That section provides, in part, as follows:

"The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed."[16]

It is clear, therefore, the court alone has the power to dismiss a criminal action in this state, and it is not bound to obey an order of the district attorney for such dismissal.[17]

IV. Compensation and Fees.

§ 17. In General.—In the earlier history of the state it seems to have been the policy of the law to compensate county officials, including district attorneys, mostly, and

13. People v. Ruef, 14 Cal. App. 576, 114 Pac. 48, 54.
14. 22 Ruling Case Law, 97.
15. Pen. Code, § 1386.
16. Pen. Code, § 1385.
17. People v. Ward, 85 Cal. 585, 24 Pac. 785. See Criminal Law, vol. 7, p. 1001.

in many cases entirely, by fees collected for works performed.[18] By the constitution of 1878–79 it was intended to abolish the fee system. Pursuant thereto the legislature has classified the different counties for the purpose of regulating compensation. It has provided that the officers shall get flat salaries,[19] and that fees collected shall be turned over to the treasury.[20] For example, section 3553 of the Political Code, providing that the district attorney is entitled to receive and retain for his own use a specified fee for each suit brought against a delinquent purchaser of state land, is not necessarily repealed by the acts relating to salaries; but any moneys collected pursuant thereto must be paid to the county treasurer.[1]

It is specifically declared that the salaries and fees provided by statute shall be in full compensation for all services of every kind and description rendered either as officers or ex-officers, their deputies and assistants, unless otherwise provided, and all deputies employed shall be paid by their principals, unless otherwise provided.[2] Clearly, it is reasoned, this does not allow a district attorney to claim extra compensation for his services, or for the services of any deputy or assistant unless the law itself allows a deputy or assistant, and fixes the salary. Indeed, the payment for such services by the county would constitute an increase of the district attorney's compensation during his term in contravention of section 9 of article

18. See the following cases decided under the former law: Edwards v. County of Fresno, 74 Cal. 475, 16 Pac. 239; Lake County v. Sulphur Bank Q. Min. Co., 66 Cal. 17, 4 Pac. 876; Pillsbury v. Brown, 45 Cal. 46; Herrington v. Santa Clara Co., 44 Cal. 496; People v. Central Pac. R. R. Co., 43 Cal. 398; Cole v. McKune, 19 Cal. 422; Higby v. Calaveras County, 18 Cal. 176; People v. Brown, 16 Cal. 441; Hereford v. Sacramento County, 1 Lab. 201.

19. County of Kern v. Fay, 131 Cal. 547, 63 Pac. 857, per Van Dyke, J. See Const., art. XI, § 5; Pol. Code, §§ 4230–4287. See COUNTIES, vol. 7, p. 429.

20. Pol. Code, § 4153, subd. 5, based on County Government Act, 1897, p. 488, § 132.

1. County of Kern v. Fay, 131 Cal. 547, 63 Pac. 857.

2. Pol. Code, § 4290, substantially the same as County Government Act, 1897, p. 572, § 215. See COUNTIES, vol. 7, p. 438.

XI of the constitution.[3] Similarly, a district attorney may make no contract to receive any compensation outside of that allowed by law for his services, as the legal adviser of the board of supervisors of his county, or as to cases of the county in which it is his duty as district attorney to appear and conduct. He may, however, contract with the supervisors for a special compensation to attend to the interests of the county in a suit which is to be tried in another county after the expiration of his term of office, if the contract is made in good faith.[4] However, in this connection it should be remembered that a district attorney, during his incumbency, is bound to perform all services connected with his office for the salary affixed thereto, no matter in what court the litigation is had.[5]

The salaries of district attorneys are not audited and allowed by the boards of supervisors of counties, but by the county auditors.[6] Hence, one having the title to the office of district attorney, but not in possession, is not bound by a judgment in mandamus against a board of supervisors to which he was not a party, requiring the board to audit and allow the salary of another in possession of the office without title.[7]

Where district attorney holds over.—Where a district attorney holds office until his successor qualifies he is entitled to receive compensation in proportion to his monthly salary for such part of a month as he may hold over, after the expiration of the term for which he was elected, until his successor has qualified.[8]

3. Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651. See supra, § 12; Counties, vol. 7, p. 442; and Public Officers.

4. Jones v. Morgan, 67 Cal. 308, 7 Pac. 734. See Counties, vol. 7, p. 439.

5. See supra, § 10.

6. Pol. Code, § 4288. See Public Officers.

7. Dorsey v. Smyth, 28 Cal. 21, construing Wood's Digest, §§ 2, 9.

8. Dillon v. Bicknell, 116 Cal. 111, 47 Pac. 937. See Counties, vol. 7, p. 441.

§ 18. Prosecutions Within Cities.—The prosecution of offenses involving a violation of the state law or a county ordinance is a function of the state, even though it is performed within the limits of a city. Hence the burden of such prosecutions is to be assumed by the state, or the counties, into which the state is, for governmental purposes, subdivided. Of course, the duty of prosecuting for violation of the charter or city ordinances presents a different question. With reference to the latter it has been said that the prosecutions may properly be regarded as included within the functions of the city, and as a consequence must be paid for by it. But where the city has, in its charter, assumed and provided for this latter duty, the provisions of the charter will control as against an act of the legislature on the subject, by reason of the constitutional amendment exempting charters from legislative control in municipal affairs. In accord with these principles a statute would be invalid which provides that the salary of a prosecuting attorney required to conduct all criminal cases shall be a charge upon the city. Likewise a statute would be invalid which provides for an attorney to prosecute cases for violations of city ordinances when the city by its charter has provided for a city attorney to prosecute such cases.[9] The converse of this proposition is equally true that the state or county is not liable for the compensation of a prosecuting attorney for services rendered in prosecuting violations of municipal ordinances.[10]

9. Fleming v. Hance, 153 Cal. 162, 94 Pac. 620, construing statute creating police court in city of Los Angeles (Stats. 1901, p. 95), as amended in 1907 (Stats. 1907, p. 850); and holding also that the prosecuting attorney, though acting at the request of the city attorney, could not claim to be a deputy of the latter where the charter made no provision for such deputies.

10. Pillsbury v. Brown, 47 Cal. 477, holding that the statute of 1869–70, in fixing the fees of district attorneys upon convictions had for misdemeanors committed, referred only to misdemeanors defined as such by the general public law of the state, and not to convictions for the breaches for mere local municipal ordinances, even though termed misdemeanors for

V. Deputies and Assistants.

§ 19. **Deputies.**—As in the case of other county, townships or district officers generally, a district attorney may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office.[11] The law contemplates that the deputy shall assist the district attorney in the discharge of all his official duties,[12] and he must be deemed to be clothed with the powers and privileges necessary for that purpose,[13] including the right to be present at the examination before the grand jury.[14] Indeed, while acting for the district attorney, his

convenience of general designation and prosecuted in the name of the people of the state.

11. Pol. Code, § 4024, the same as former County Government Act, 1897, p. 479, § 59; Freeman v. Barnum, 131 Cal. 386, 82 Am. St. Rep. 355, 63 Pac. 691; People v. Schmidt, 33 Cal. App. 426, 165 Pac. 555.

Subdivision 26 of section 25 of the former County Government Act provided for the appointment by the district attorney under authorization of the supervisors of an assistant district attorney. But this provision was omitted when the act was incorporated in the Political Code. See the following cases decided under the former provisions: Freman v. Marshall, 137 Cal. 159, 69 Pac. 986; Freeman v. Barnum, 131 Cal. 386, 82 Am. St. Rep. 355, 63 Pac. 691 (holding that the assistant district attorney is but a deputy whom the district attorney is authorized to appoint under section 61 of that act, and that the provision for his payment under the former section is not unconstitutional); County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483 (holding that the provision did not contemplate the employment by the supervisors of special counsel, who may or may not be acceptable to the district attorney, to take part in particular cases). See Public Officers. And as to right of member of legislature to hold the office of deputy district attorney see Legislature.

12. County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483; People v. Magallones, 15 Cal. 426.

13. People v. Magallones, 15 Cal. 426.

14. People v. Magallones, 15 Cal. 426 (construing act of April 23, 1858, authorizing the board of supervisors of the city and county of San Francisco to appoint an assistant prosecuting district attorney); People v. Schmidt, 33 Cal. App. 426, 165 Pac. 555 (holding that an indictment is not subject to a motion to quash on the ground that persons other than those authorized by law were permitted to be present during the proceedings taken before the grand jury, where the alleged unauthorized person was one who had been appointed a deputy dis-

acts possess the same validity, and must be regarded in the same light, as if done by that officer in person.[15] Even the acts of a mere de facto deputy, acting under the direction of the district attorney are valid.[16]

Compensation.—In those counties in which no provision is made by law therefor, all deputies employed must be paid for by the district attorney.[17] So also when the statute makes provision for a specified number of deputies in a particular county, and the district attorney appoints deputies in excess of such number, he must pay them at his own expense, if they are to receive compensation.[18] Under a statute authorizing a district attorney to appoint "two deputy district attorneys at a salary of fifteen hundred dollars per annum," the words employed denote that each of the deputies is to receive that salary.[19]

§ 20. Associate Counsel.—While it is the duty of the attorney general to assist a district attorney when required by the public service or directed by the governor,[20] the practice of allowing district attorneys to have the assistance of private counsel in the prosecution of criminal cases has existed and been acquiesced in almost since the organization of the state,[1] and is sanctioned by legislative

trict attorney after the number of deputies who are allowed compensation by the statute had been appointed). See GRAND JURY.

15. People v. Magallones, 15 Cal. 426.

16. People v. Turner, 85 Cal. 432, 24 Pac. 857, holding that an information for murder signed and filed by a de facto assistant district attorney appointed by the board of supervisors instead of by the district attorney, but acting under the approval and by the directions of the district attorney, is valid, and it is not error to refuse to strike it from the files of the court or to set it aside on the ground that the information had not been signed, presented, or filed by the district attorney.

17. See supra, § 17. See COUNTIES, vol. 7, p. 441.

18. People v. Schmidt, 33 Cal. App. 426, 165 Pac. 555. See McPhail v. Jefferds, 130 Cal. 480, 62 Pac. 735, as to the effect of the County Government Act of 1897 upon the salaries of officers provided for under the act of 1893.

19. Freman v. Marshall, 137 Cal. 159, 69 Pac. 986.

20. See ATTORNEY GENERAL, vol. 3, p. 566.

1. People v. Turcott, 65 Cal. 126, 3 Pac. 461; People v. Lynch, 1 Cal.

action, for in prescribing the course of the trial the legislature has provided that the district attorney, or other counsel for the people, must open the cause and offer the evidence in support of the charge, and, that if the indictment or information be for an offense punishable with death, two counsel on each side may argue the cause to the jury.[2] Whether the district attorney should be allowed associate counsel to aid him in the management of a case is a matter resting in the discretion of the court, and where there is no abuse of that discretion the appellate court will not interfere.[3] Not only may the court allow private counsel to assist the district attorney but it may permit such counsel to take the most active part at the trial in the prosecution of the case.[4] It may allow such counsel to open[5] or to conclude the argument,[6] or both to open and close the argument.[7] Indeed, he is given that right by statute.[8] If private counsel assist in the prosecution of a criminal case, counsel for the defense has a right to ask the prosecuting witness if he has em-

Unrep. 444. See Counties, vol. 7, p. 458, as to the power of supervisors to employ counsel to assist the district attorney in conducting suits to which the county is a party. See note, 11 A. L. R. 1192, as to validity of contract by attorney to prosecute or assist in prosecution of criminal case on contingent fee.

2. Pen. Code, § 1093, subd. 2, 1095; People v. Turcott, 65 Cal. 126, 3 Pac. 461; People v. Strong, 46 Cal. 302.

3. People v. Blackwell, 27 Cal. 65; People v. Lynch, 1 Cal. Unrep. 444.

4. People v. Lynch, 1 Cal. Unrep. 444.

5. People v. Powell, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481.

6. People v. Powell, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481; People v. Murphy, 47 Cal. 103. Formerly section 1093 of the Penal Code provided that the district attorney or other counsel for the people must open and the district attorney may conclude the argument. Construing this section with section 1094 of the same code, it was held if private counsel were allowed to conclude the argument and if nothing appeared in the record to the contrary, the presumption is that the court had good reasons for so doing. People v. Strong, 46 Cal. 302. The section has since been amended to provide as follows: "The district attorney, or other counsel for the people, opening the argument and having the right to close."

7. Pen. Code, § 1093, subd. 5. People v. Powell, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481.

8. Pen. Code, § 1093, subd. 5.

ployed such associate counsel, for it may be that the witness was influenced by a private grudge against the defendant, in which event it is a matter going to his credibility.[9]

§ 21. Substitute Counsel.—Section 472 of the Political Code contains the following provision:

"Whenever a district attorney in any county of this state shall, for any reason, become disqualified from conducting any criminal prosecution within such county, the attorney general may employ special counsel to conduct such prosecution, and the attorney's fee in such case shall be a legal charge against the state."[10]

Hence, in such a condition, the duty of seeing that there is a proper prosecution seems to devolve on the attorney general; although it is probably the duty of the court to inform the attorney general of the condition.[11]

Section 1130 of the Penal Code provides that

"If the district attorney fails to attend at the trial, the court must appoint some attorney at law to perform the duties of the district attorney on such trial."[12]

This section evidently refers only to a sudden emergency caused by the unexpected failure of the district attorney to appear, and not to a case of long-standing disqualification, incapable of being removed, and well known to the court for a long period before the time of trial. There might be circumstances, it is said, under which the court, acting under section 1130, would not be required to wait until the very day of trial before making the appointment; as, for instance, where a few days before the trial the court was informed for the first time of the absence

9. People v. Blackwell, 27 Cal. 65, citing 1 Greenl. Ev. §§ 449, 450; Baker v. Joseph, 16 Cal. 173. See WITNESSES.

10. See ATTORNEY GENERAL, vol. 3, p. 563.

11. Toland v. Ventura County, 135 Cal. 412, 67 Pac. 498.

12. Toland v. Ventura County, 135 Cal. 412, 67 Pac. 498; County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483. See CRIMINAL LAW, vol. 8, p. 223.

of the district attorney from the state, or of his sudden illness or death. But these instances differ materially from a permanent disqualification of the district attorney which was known to the judge of the court for several months before the date of the order, For such a condition the only provision made by the statute, in addition to the general power of the attorney general, by himself or deputy, to conduct a criminal prosecution, is that found in section 472 of the Political Code, above quoted.[13] Further it has been said that the provisions of section 1130 are not exclusive, and where the board of supervisors have, at the request of the district attorney, employed other counsel to conduct the prosecution, without any formal order of the court, the defendant has no ground of complaint, if the special counsel have not been guilty of misconduct prejudicial to him.[14]

13. Toland v. Ventura County, 135 Cal. 412, 67 Pac. 498.

14. People v. Walters, 98 Cal. 138, 32 Pac. 864.

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See Animals, vol. 2, p. 41; Landlord and Tenant.

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See Courts, vol. 7, p. 571.

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I. INTRODUCTORY.

§ 1. Scope of Article.—It is the purpose of this article to discuss questions relating to the dissolution of the marriage relation by judgment of a court of competent jurisdiction decreeing a divorce of the parties, the general operation and effect of such dissolution, the principles relating to the custody and control of the children of the marriage, the validity and operation of foreign divorces, and also the general validity and effect of agreements between spouses to live separate and apart. Other related matters, such as the allowance of alimony, costs and suit money, and suits for separate maintenance,[1] the effect of

1. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 939.

divorce upon the rights of the spouses in the community property,[2] and the homestead rights of the spouses,[3] are treated under appropriate titles. The annulment of the marriage relation by decree of court is clearly distinguished from divorce,[4] and is treated in its appropriate place, as are also questions as to the validity and requisites of a marriage,[5] and the general rights and disabilities of husband and wife inter se and as regards third persons.[6] References will also be found throughout this article to other titles which are more or less connected with the general subject under discussion.

§ 2. **Historical Review.**—Under the Mosaic law a husband could divorce his wife by giving her a "bill of divorcement" and sending her out of his house whenever it came to pass that she found no favor in his eyes because he had "found some uncleanliness in her." The dissolution of the marriage thus brought about was absolute, so that even the wife could marry again.[7] Christ repealed Jewish divorce law by divine authority, and taught that the marriage contract could be annulled for only one cause, to wit, adultery.[8] By the civil law, either party might renounce the marriage union at pleasure. Justinian for a short time abolished divorces, but was compelled to revive them again. The Code Napoleon admitted of divorces for several named causes, to be pronounced by the tribunals, where the parties could not agree on a dissolution, and in cases where the parties agreed thereto.[9]

In England, at least for a long time prior to 1858, divorces from the bonds of matrimony were granted only by act of Parliament;[10] but it is not quite so clear that such

2. See COMMUNITY PROPERTY, vol. 5, p. 358.
3. See HOMESTEADS.
4. See infra, § 6.
5. See MARRIAGE.
6. See HUSBAND AND WIFE.
7. Deut. xxiv, 1–4.
8. Matt. xix, 3–12.
9. 9 Ruling Case Law, 243.
10. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

divorces were not at one time granted by the high court of chancery, which borrowed its jurisdiction from the aequitas and judicial powers of the Roman magistrates.[11] Divorces from bed and board, however, were decreed by the ecclesiastical courts, and then only for adultery or cruelty.[12] In the Roman Catholic states, heretofore, divorces were not allowed, because marriage was considered by them a sacrament and indissoluble. And at one time by the Mexican law, which followed the canon law in this particular, marriage lawfully contracted in the face of the Roman church, according to its rites and ceremonies and between members thereof, and finally consummated, could not be dissolved by the civil tribunals. On the other hand, the union of a man and woman, in the character of husband and wife, without the sanction of the church, when both of them belonged to the class of the unfaithful, was considered as a mere civil contract, and, like other contracts, came within the legitimate sphere of the ordinary jurisdiction of courts of first instance.[13]

§ 3. Kinds of Divorce—Distinctions.—At common law there are two kinds of divorce, the one total—a vinculo matrimonii—and the other partial—a mensa et thoro. The one dissolved the marriage relation absolutely, while the other operated as a mere temporary separation, leaving all the other marital rights and obligations in full force during the life of the parties and being subject to the complete restoration of the marital status by reconciliation.[14] At one time in California divorces of both kinds were authorized,[15] but at the present time all divorces are abso-

11. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 8 Pac. 709.

12. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

13. Harman v. Harman, 1 Cal. 215.

14. 9 Ruling Case Law, 243.

15. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Banks v. Banks, 1 Lab. 116 (holding that where a divorce from bed and board was prayed for, the complaint might be amended by altering its prayer so as to ask for a decree of divorce from the bonds of matrimony); Miller v. Miller, 33 Cal. 353, holding that a judgment awarding a divorce, without stating whether from the bonds

lute.[16] When the marriage is finally dissolved, each party is relieved from all the obligations of the bond. They are then single persons, free to marry again, and their acts are, as between themselves, the acts of strangers, no obligations or duties being due from one to the other.[17] Yet while the present statutes do not, in terms, authorize a partial divorce, section 136 of the Civil Code does, in effect, do so. This section authorizes the court, in an action for divorce, to provide for the maintenance by the husband of the wife and children, though a judgment of divorce is denied. And it has been said that it matters not whether the decree effects a divorce a mensa et thoro or a legal separation with a provision for the support of the wife, it being purely a matter of words. Parties thus partially divorced may become reconciled and renew their relations without marriage, but the husband cannot, of his own volition, resume his rights.[18]

§ 4. Legislative Control.—In this country it is the province of the legislatures of the several states to regulate the subject of divorce as applied to their citizens and persons domiciled within their jurisdiction, the national power having no jurisdiction of marriage and divorce within the local limits of the states.[19] The power of a

of matrimony or from bed and board, was a divorce from the bonds of matrimony.

16. Krzepicki v. Krzepicki, 167 Cal. 449, 140 Pac. 13; McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Ex parte Spencer, 83 Cal. 450, 17 Am. St. Rep. 266, 23 Pac. 395 (dissenting opinion, per Patterson, J.); Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838; Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518.

17. Ex parte Spencer, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395, per Patterson, J., dissenting. See infra, §§ 108–111, for full discussion of the effect of a final decree of divorce.

18. Sweasey v. Sweasey, 126 Cal. 123, 58 Pac. 456, per Temple, J. In this connection, see McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838; Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518; and ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 1019, as to the circumstances in which such allowance may be made.

19. McNeil v. McNeil, 78 Fed. 834, quoting Bishop on Marriage and Divorce.

state legislature in this regard is unlimited and supreme except as restricted by the constitution.[20] The constitution of California provides that the legislature shall not pass local or special laws granting divorces,[1] and thereby prohibits the legislature itself from granting divorces. The power to grant divorces has therefore become judicial.[2] But the right to a divorce[3] and the right to determine for what causes and in what manner the marriage relation may be dissolved,[4] are still subject to the legislative will. Indeed, it has been said that the legislature has complete control of the subject, and may impose whatever restrictions or delays it pleases, either in regard to the time for beginning the action, or the method and order of procedure after the action is begun.[5] As the right to a divorce is statutory, the legislature can repeal the law and thus effectually prevent the granting of any divorces, or it can suspend the right for any number of years after the beginning of an action, without affecting the constitutional grant of jurisdiction to the courts in such cases.[6] The jurisdiction of the divorce courts, like the jurisdiction of probate courts, rests upon the right of a sovereign state to exercise control over all the property within its boundaries and to determine the status or condition of its in-

20. 9 Ruling Case Law, 245.

1. Const., art. IV, § 25, subd. 5.

2. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 8 Pac. 709.

3. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891.

4. Estate of Gregorson, 160 Cal. 21, Ann. Cas. 1912D, 1124, L. R. A. 1916C, 697, 116 Pac. 60; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28. See Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac 891, holding that in view of the subject matter and purpose of the act, the provision for the postponement of final judgment for one year and a suspension of the power of the court to enter such judgment in the meantime, is not an unreasonable regulation of the procedure, and is within the legislative power to prescribe, as a condition necessary to the existence of the right to a divorce.

5. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53.

6. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891.

habitants or persons found within its borders, and no federal question is involved.[7]

§ 5. Nature of Divorce Proceedings.—A suit for divorce under the California system is regarded as, or substantially as, a suit in equity.[8] Accordingly, the supreme court has appellate jurisdiction thereof,[9] regardless of the amount involved.[10] A proceeding for divorce is not exclusively either in personam or in rem. So far as concerns the jurisdiction of the court to award alimony and costs the proceeding is regarded as strictly in personam,[11] and the court must obtain jurisdiction of the defendant personally in order to render the decree therefor binding upon him, or it must acquire jurisdiction over property of the defendant within the jurisdiction.[12] On the other hand, so far as the action affects the status of the parties, it is a proceeding in rem,[13] and a service of summons by pub-

7. Huneke v. Huneke, 12 Cal. App. 199, 107 Pac. 131, citing Estate of Clark, 148 Cal. 108, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, 1 L. R. A. (N. S.) 996, 82 Pac. 760; De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Richards v. Blaisdell, 12 Cal. App. 101, 106 Pac. 732.

8. Harron v. Harron, 123 Cal. 508, 56 Pac. 334; Gaston v. Gaston, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609; Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164; Holt v. Holt, 107 Cal. 258, 40 Pac. 390; Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648; Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 8 Pac. 709; Lyons v. Lyons, 18 Cal. 447; Fuller v. Fuller, 17 Cal. 605; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Kashaw v. Kashaw, 3 Cal. 312; Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403. See COURTS, vol. 7, p. 599.

9. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 8 Pac. 709. See APPEAL AND ERROR, vol. 2, p. 201.

10. Harron v. Harron, 123 Cal. 508, 56 Pac. 334. See infra, § 124 et seq. as to the appellate jurisdiction of the supreme court.

11. Matter of McMullin, 164 Cal. 504, 129 Pac. 773; De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Shillock v. Shillock, 24 Cal. App. 191, 140 Pac. 954. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 949.

12. See infra, § 66. See COURTS, vol. 7, p. 597; PROCESS.

13. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; In re Newman, 75 Cal. 210, 7 Am. St. Rep. 146, 16 Pac. 887.

lication on a nonresident defendant is good.[14] The same is true with respect to the custody of minor children within the jurisdiction of the court,[15] although the court has no authority over the children, if they are not within its jurisdiction.[16]

§ 6. Distinguished from Annulment of Marriage. — Strictly speaking, the word "divorce" means a dissolution of the bonds of matrimony, based upon the theory of a valid marriage, for some cause arising after the marriage, while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of marriage, no valid marriage ever existed.[17] This is true even though the marriage be only voidable at the instance of the injured party, or, in other words, "capable of being annulled," and it is the decree of nullity in such a proceeding which determines that no valid marriage ever existed.[18] Accordingly, it has been stated that there is no statutory provision applicable to annulment proceedings for the apportionment of what would be community property if the marriage was valid, although complete provision for the disposition of community property in the event of "the dissolution of the marriage by the decree of a court of competent jurisdiction" is made by section 146 of the Civil Code.[19] The broader meaning is, however, often given to the word "divorce" by reason of the manner in which it is used in statutory provisions. Thus

14. See infra, § 66. See PROCESS.

15. Matter of McMullin, 164 Cal. 504, 129 Pac. 773; In re Newman, 75 Cal. 210, 7 Am. St. Rep. 146, 16 Pac. 887.

16. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; In re Culp, 2 Cal. App. 70, 83 Pac. 89.

17. Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394. See MARRIAGE.

18. Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394; Estate of Gregorson, 160 Cal. 21, Ann. Cas. 1912D, 1124, L. R. A. 1916C, 697, 116 Pac. 60.

19. Coats v. Coats, 160 Cal. 671, 36 L. R. A. (N. S.) 844, 118 Pac. 441.

it may well be argued that such provisions in the subdivision of the Civil Code entitled "General Provisions" (article IV) as are appropriate in actions for annulment are applicable to divorce actions.[20] But in view of the more specific headings of the various articles and the nature of their provisions, it has been held that, notwithstanding the use of the word "divorce" as the title of the chapter, the term "divorce" in article III cannot be fairly construed as including nullity proceedings.[1]

§ 7. Survey of California Law.—Owing to the strength of human passions and the weakness of human nature, the regulation and preservation of the institution of marriage and the prevention of the abuse of the right of divorce have always been one of the most difficult problems of government. It has generally been considered essential to the promotion of happiness and the good order of society to provide that, for certain offenses against marital rights, the innocent party may, under fixed restrictions, have the marriage dissolved by judicial decree. The causes for divorce, however, have been extended in modern times, although in every civilized nation there is a progressively increasing reverence for the married state. The law of California affords an illustration of the liberality of modern divorce laws. This state authorizes divorces to be granted in various cases in which, in a large number of the other states, they are not permitted. Here they are allowed absolutely for such causes as extreme cruelty, willful desertion, willful neglect, and habitual intemperance,—causes which in many of the other states only authorize a divorce from bed and board.[2]

20. Dunphy v. Dunphy, 161 Cal. 87, 118 Pac. 445. See Alimony and Separate Maintenance, vol. 1, p. 960.

1. Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394, per Angellotti, C. J.

2. See infra, § 14, as to causes for divorce in California.

However, the law has not left the marriage relation without safeguards. Thus, with a view to guard against fraud and collusion, it requires residence within the state for the period of one year before a party can bring an action for divorce, and, with the same end in view, it provides that no divorce can be granted upon the default of the defendant, or upon the uncorroborated testimony of the parties. In addition to these provisions the law specially provides that decrees must be denied whenever connivance or collusion appears. But perhaps the most progressive step ever taken in the direction of preventing hasty and ill-advised divorces was when, in 1903, the legislature provided for the granting of an interlocutory decree, which, under the law, cannot become final until the expiration of one year, during which interval the parties remain in the legal relation of husband and wife. In 1921, the legislature declaring that the increasing number of divorces throughout the nation is the cause of great alarm to those who recognize the value of sustained family relations to the nation, and that the problem has become a national one and should be regulated by the formulation of uniform laws throughout the nation regulating the causes for and the manner of granting divorces, memorialized the President of the United States to call a conference of representatives of the states to discuss the problem and formulate recommendations concerning the manner in which the situation may be met and solved.[3]

II. PUBLIC POLICY AS TO DIVORCE.

§ 8. In General.—While the law deems it necessary to provide that a divorce may be granted when conditions are such as to make the marriage relation intolerable, it is nevertheless true that the policy of the law does not favor the dissolution of marriages.[4] On the contrary, the

3. Assembly Joint Resolution No. 28, Stats. 1921, p. 2196.

4. Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A.

law is at all times very solicitous to preserve the integrity of the marriage relation,[5] and its policy is to encourage the reconciliation of married persons who have become estranged,[6] unless the reconciliation be effected upon terms expressly forbidden or upon terms expressly disapproved, or, in other words, unless the terms be against the express mandate of the law or against public policy.[7] In every civilized country marriage is recognized as the most important relation in life, the preservation of which is essential to the maintenance of organized society,[8] and in which the state is vitally interested. While in a restricted sense it involves a contractual relation in which the immediate parties themselves are alone vitally interested, in a comprehensive sense it affects and permeates and is an indispensable part of the whole social system, and in that view becomes a question of vital concern.[9] Hence the well-recognized public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation and illicit unions. This policy finds expression in probably every state in this country in legislative enactments designed to prevent the sundering of the marriage ties for slight or trivial causes, or by the agreement of the husband and wife, or in any case, except upon full and satisfactory proof of such facts as have been by the legislature declared to be a cause for divorce.[10]

(N. S.) 880, 103 Pac. 488. See ATTORNEYS AT LAW, vol. 3, p. 607, as to advertising to procure a divorce as a misdemeanor. See note, 9 A. L. R. 1500, as to encouraging divorce litigation as ground for disbarment or suspension of attorney.

5. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020.

6. Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273.

7. Bowden v. Bowden, 175 Cal. 711, L. R. A. 1918A, 380, 167 Pac. 154; Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488.

8. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Berry v. Berry, 145 Cal. 784, 79 Pac. 531; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016.

9. Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273.

10. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837 (holding that a marriage cannot be dissolved by the mutual consent of the parties, even

A judgment in an action for divorce cannot be rendered for the plaintiff on the default of the defendant, even upon a verified complaint; nor can it be granted upon the uncorroborated statement, admission, or testimony of the parties.[11] The marriage relation can be dissolved only by consent of the state, and upon statutory grounds, presented in good faith to a court of competent jurisdiction. It cannot be destroyed by the mere consent, whim or caprice of the parties to the marriage, nor can it be stipulated away in judicial proceedings.[12] There can be no effectual waiver by the parties of any restriction established by law for the benefit of the public or for the protection of the interest which the state has in the preservation and permanence of the marriage relation.[13] And in harmony with the policy toward marriage it is said that all doubts should be resolved against divorce instead of for it.[14]

§ 9. State as Quasi-party.—While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said that such an action is really a triangular proceeding, in which the husband and wife and the state are parties.[15] The position of the state has been well stated as follows:

where they desire its dissolution); Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28, per Angellotti, J. And see to similar effect, Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Kuhl v. Kuhl, 124 Cal. 57, 56 Pac. 629; Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037; Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273.

11. Berry v. Berry, 145 Cal. 784, 79 Pac. 531; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016. See infra, § 99.

12. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020.

13. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891.

14. Berry v. Berry, 145 Cal. 784, 79 Pac. 531.

15. Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74

"Where an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair."[16]

The attorneys in the case represent the respective parties, and the court in a sense represents the state.[17] It is, therefore, the duty of the court to protect the public interest[18] and guard strictly against fraud, collusion or imposition.[19] Both the policy and the letter of the law concur in guarding against collusion and fraud, and it should be the aim of the court to afford the fullest possible

Pac. 28, per Angellotti, J. And see to the same effect, Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Berry v. Berry, 145 Cal. 784, 79 Pac. 531; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016; Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907; Warner v. Warner, 100 Cal. 11, 34 Pac. 523; McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53; Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273. See also concurring opinions in Bancroft v. Bancroft, 178 Cal. 359, L. R. A. 1918F, 1029, 173 Pac. 579, denying that the state is a party to divorce actions in any ordinary sense of the word.

16. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020, quoting the supreme court of Connecticut in Allen v. Allen, 73 Conn. 54, 84 Am. St. Rep. 135, 49 L. R. A. 142, 46 Atl. 242.

17. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020.

This view is in accord with the decision in the much discussed case of State v. Moore (Nev.), 207 Pac. 75, popularly known as the Pickford case. The supreme court of Nevada there held that the trial court represents the interest of the state in divorce suits, and that the attorney general has no power to intervene in such a suit, or to bring an independent action to set aside a decree of divorce, on behalf of the state for fraud and collusion in wrongfully invoking the jurisdiction of the court, either at common law, or under a statute making it the duty of the attorney general to commence or defend a suit whenever it is necessary to protect and secure the "interest of the state."

18. Stedman v. Stedman, 179 Cal. 288, 176 Pac. 437.

19. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020, per Sullivan, C. J.

hearing in such matters.[20] So, on the ground of the public interest, the courts are more liberal than in other proceedings in relieving against defaults,[1] and in granting continuances.[2]

§ 10. Contracts Promotive of Divorce Generally.—Under the code either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried.[3] Notwithstanding this freedom so to contract, it has been repeatedly held that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, is void as against public policy.[4] Thus an agreement is void as contrary to public policy, in which a spouse agrees to pay counsel fees and costs of a contemplated divorce action;[5] or in which he or she agrees not to contest a divorce suit instituted by the other.[6] Void also is an agreement to dismiss a pending divorce action in which a husband agrees to so conduct himself as to give the other a new cause of action, and to give her a sum of money wholly disproportionate to her share of the property rights.[7] Wholly different, however, from these

20. Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648; McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425.

1. See infra, § 100.

2. See infra, § 82.

3. Civ. Code, § 158. See HUSBAND AND WIFE.

4. Hare v. McGue, 178 Cal. 740, L. R. A. 1918F, 1099, 174 Pac. 663; Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488; Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907; Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801; Senter v. Senter, 70 Cal. 619, 11 Pac. 782; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; McCahan v. McCahan, 47 Cal. App. 173, 190 Pac. 458; Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954; Stoff v. Erken, 25 Cal. App. 528, 144 Pac. 312. As to contracts against public policy, generally, see CONTRACTS, vol. 6, p. 109.

5. McCahan v. McCahan, 47 Cal. App. 173, 190 Pac. 458.

6. Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954.

7. Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488.

cases is an agreement made in consideration of a reconciliation and dismissal of a pending divorce action, whereby the community property is divided between them, and the husband agrees that in case of future misconduct on his part giving the wife cause for divorce, he would pay her a certain sum of money. Such contract has for its purpose re-establishment of the marital relation and hence it is in accord with public policy.[8] A prenuptial agreement between parties about to marry that when married they should never live together, and that in the future the wife would "grant a divorce" to the husband, is void as against public policy, yet a marriage following such an agreement is valid, and creates all the mutual obligations which the law attaches to marriage.[9]

§ 11. Agreements to Abandon Defense.—An agreement by a defendant in a pending action for divorce to withdraw his or her opposition and to make no defense is void as it is not only clearly promotive of divorce,[10] but also contemplates the perpetration of a fraud upon a court of justice.[11] The courts, therefore, esteem it their duty to interfere, upon their own motion, whenever it appears that the dissolution is sought to be effected by the connivance or collusion of the parties.[12] As such an agreement is void,

8. Bowden v. Bowden, 175 Cal. 711, L. R. A. 1918A, 380, 167 Pac. 154, distinguishing cases involving antenuptial agreements to the same effect. Such agreements are without consideration, for the reason that at the outset of the relationship the law itself imposes the prescribed duty upon both spouses, and that, therefore, there is no consideration where one spouse agrees that if he does offend in the future he will pay a penalty in addition to that which the law may exact. See note, 11 A. L. R. 277, as to validity and enforceability of agreement designed to prevent divorce, or avoid or end separation.

9. Jenny v. Jenny, 178 Cal. 604, 174 Pac. 652. See MARRIAGE.

10. Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801; Senter v. Senter, 70 Cal. 619, 11 Pac. 782; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954; Stoff v. Erken, 25 Cal. App. 528, 144 Pac. 312.

11. Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954.

12. Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801. See infra, § 53, as to connivance.

it will be disregarded by the court in disposing of the community property, even though the court was not misled by it, and even though it was repudiated by one of the parties, and all the issues in the action were vigorously contested.[13] So also no action will lie to enforce it, whether or not a divorce would have been granted if the defense had not been abandoned.[14] But this rule is not applicable to an agreement by the parties to an action for divorce, made during the trial, that the case be submitted on the evidence then in, and that the husband abandon to the wife certain property.[15]

§ 12. Contracts Between Wife and Attorney.—The principle that contracts promotive of divorce are unlawful and void[16] applies with equal force to a contract between a married woman and an attorney, the enjoyment of whose benefits by the latter depends upon procuring a divorce. It applies, for example, to a contract between them for a contingent fee and a contract, by which the attorney is to have a portion of, or an interest in, any community property that may be recovered.[17] While contracts for contingent fees are generally upheld on the ground that they are necessary to enable those without means to protect their rights,[18] this reason is inapplicable to divorce cases as the law has taken care that the wife shall not be without assistance in proper cases either to prosecute or defend such actions. The court in its discretion may require the husband to pay as alimony any money necessary

13. Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801.

14. Beard v. Beard, 65 Cal. 354, 4 Pac. 229.

15. Stoff v. Erken, 25 Cal. App. 528, 144 Pac. 312.

16. See supra, § 10.

17. Parsons v. Segno, 187 Cal. 260, 201 Pac. 580; Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907. See the following cases involving such contracts, but not determining their validity: White v. White, 86 Cal. 212, 24 Pac. 1030; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480. In the Sharon case, however, it was intimated that such a contract was invalid.

18. See ATTORNEYS AT LAW, vol. 3, p. 693.

to enable the wife not only to support herself, but also to prosecute or defend the action, and is given ample power to enforce such order.[19] The reason or necessity for contingent fees does not exist in divorce cases, and where the reason ceases the rule also ceases.[20]

§ 13. Contracts for Procuring Evidence.—While there is no rule of law which precludes a party in a divorce action, or in any other action, from employing a person to do detective work or to search for witnesses or to procure existing testimony either to support or defend such an action,[1] a contract is void whereby one agrees to obtain or procure testimony of certain facts which will successfully support or defeat a lawsuit, or which provides that payment to the party procuring such testimony is to be contingent upon the result of the action for which he is engaged to procure it. Such a contract is vitiated because the element of payment contingent on the success of the litigation in which the evidence is to be produced, or because it contemplates the procuring of evidence, not of facts as they exist, but of particular facts necessary to the success of the party litigant who contracts for their production.[2]

III. Causes for Divorce.

In General.

§ 14. Causes Generally.—As has been stated, it is within the power of the legislature to determine what matters

19. See Alimony and Separate Maintenance, vol. 1, p. 989.

20. Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907.

1. Hare v. McGue, 178 Cal. 740, L. R. A. 1918F, 1099, 174 Pac. 663, citing Neece v. Joseph, 95 Ark. 552, Ann. Cas. 1912A, 655, 30 L. R. A. (N. S.) 273, 129 S. W. 797; Quirk v. Miller, 14 Mont. 467, 43 Am. St. Rep. 647, 25 L. R. A. 87, 36 Pac. 1077. See Contracts, vol. 6, p. 131.

2. Hare v. McGue, 178 Cal. 740, L. R. A. 1918F, 1099, 174 Pac. 663, citing Patterson v. Donner, 48 Cal. 369; Lyon v. Hussey, 82 Hun, 15, 31 N. Y. Supp. 281.

shall be grounds for divorce.[3] Accordingly, it has declared in section 92 of the Civil Code that divorces may be granted for any of the following causes: adultery;[4] extreme cruelty;[5] willful desertion;[6] willful neglect;[7] habitual intemperance; and conviction of felony.[8] And the courts have no power to grant a divorce on any other ground. It will be observed that the code provides that a divorce may be granted for "any" of the causes enumerated.[9] It follows that if one cause is sufficiently established, a divorce may properly be granted, even though other causes are alleged but are not established.[10] While the provision is that divorces "may" be granted for one of the recognized causes, it is clear that a court has no arbitrary power to grant or refuse relief. If a complainant has established his or her right to a divorce the court is not authorized to deny a decree.[11]

§ 15. Habitual Intemperance—Conviction of Felony.—The habitual intemperance which is a cause for divorce is defined by the Civil Code to be "that degree of intemperance from the use of intoxicating drinks which disqualifies

3. See supra, § 4.

4. See infra, § 16 et seq.

5. See infra, § 21 et seq.

6. See infra, § 36 et seq.

7. See infra, § 48 et seq.

8. See infra, § 15. See note, 17 A. L. R. 793, as to constitutionality of discrimination as between husband and wife as to grounds of divorce. See note, 13 A. L. R. 1435, as to concealment of pregnancy as ground for annulment of marriage or divorce.

Formerly, the causes now enumerated as grounds for annulling marriages were regarded as causes for divorce. Baker v. Baker, 13 Cal. 87, construing act of April, 1853. See MARRIAGE, as to causes for annulling marriages.

9. Civ. Code, § 92.

10. Percy v. Percy, 63 Cal. Dec. 596, 207 Pac. 369; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Huellmantel v. Huellmanted, 117 Cal. 407, 49 Pac. 574; Reid v. Reid, 112 Cal. 274, 44 Pac. 564; Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137; Fuller v. Fuller, 17 Cal. 605; Dracovich v. Dracovich, 35 Cal. App. Dec. 519, 200 Pac. 44.

11. Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367; Lowman v. Lowman, 165 Cal. 352, 132 Pac. 439 (desertion); Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 Pac. 853 (desertion); Benkert v. Benkert, 32 Cal. 467 (desertion).

the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party."[12] To constitute a ground for divorce such intemperance must continue for one year.[13] And since the habit of intemperance may be discontinued, a plaintiff who proves intemperance many years since, must prove a continuance of the offense.[14] It is not necessary, however, to prove that the habit of drinking intoxicating liquors to excess is of such a character as to render the offender at all times incapable of attending to business; it being sufficient if it disqualify him from attending to his business during the principal portion of the time usually devoted to business.[15]

Conviction of felony.—While conviction of felony is made a cause for divorce in California,[16] a divorce sought upon this ground must be denied if "the action is not commenced before the expiration of two years after a pardon, or the termination of the period of sentence."[17]

Adultery.

§ 16. In General.—Adultery, as a cause for divorce, is defined by the code, as "the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife."[18] Under express provision of the Civil Code, an action for divorce on this ground must be "commenced within two years after the commission of the act of adultery, or after its discovery by the

12. Civ. Code, § 106; Dunn v. Dunn, 62 Cal. 176.

13. Civ. Code, § 107; Dunn v. Dunn, 62 Cal. 176, holding that a finding showing the continuance of intemperance for one year is essential to uphold the judgment.

14. Wilkinson v. Wilkinson, 1 Lab. 162.

15. Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91.

16. Civ. Code, § 92.

17. Civ. Code, § 124, subd. 2. See infra, § 60.

18. Civ. Code, § 93; Ex parte Sullivan, 17 Cal. App. 278, 119 Pac. 526.

injured party.'"[19] It is no justification for the commission of adultery by one spouse that he or she has been willfully deserted by the other, and, where the desertion has not lasted for the period required to constitute a ground for divorce, it does not bar a suit for divorce on the ground of the adultery.[20]

§ 17. Evidence Generally.—The act of adultery, like any other fact, may be established by circumstantial proof.[1] Indeed, that is the usual way in which it is proven.[2] In proving adultery in this manner two facts must be established,—a criminal disposition or desire in the mind of both the defendant and the particeps criminis, and an opportunity to commit the crime.[3] Any finding of adultery would be unwarranted where the evidence at most shows merely an opportunity for adultery, and there is no proof of circumstances regarding the general conduct of the accused spouse and the corespondent toward each other, nor regarding the disposition of the corespondent which would afford a basis for the belief that given the opportunity, the parties would indulge in illegal relations.[4] But evidence that the husband, after deserting his wife, formed an adulterous connection with another woman, who, with his knowledge and consent, called him her husband, and used his name as such, the husband likewise referring to and designating her as his wife, is sufficient to support a finding as to the husband's adultery with such woman. And documentary evidence is admissible to prove

19. Civ. Code, § 124. See infra, § 60.

20. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717. But holding, under the statutes in force at the time of the decision, that the trial court could restrict the plaintiff's relief to a divorce a mensa et thoro. See infra, § 58 et seq.

1. Evans v. Evans, 41 Cal. 103; Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035. As to circumstantial evidence generally, see EVIDENCE.

2. Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035.

3. Koenigstein v. Koenigstein, 35 Cal. App. Dec. 762, 200 Pac. 730, quoting from Hartshorn v. Hartshorn (Okl.), 168 Pac. 822.

4. Bennett v. Bennett, 32 Cal. App. Dec. 948, 192 Pac. 180.

that they held each other out as husband and wife.[5] Of course, a defendant may explain any suspicious circumstances proved and thereby rebut any adverse inference that might otherwise be drawn therefrom.[6]

Confessions and admissions.—A confession[7] or admission[8] of adultery by the party charged is admissible in evidence, but does not justify a decree of divorce unless corroborated.[9]

Testimony of alleged paramour.—The admissibility of the testimony of the alleged paramour to prove the charge of adultery is not questioned. But the question of the credibility of such evidence is quite another matter.[10] If the alleged paramour denies the adultery and improper intimacy, he may be cross-examined as to the conduct of himself and defendant towards each other in traveling together, and their intimacy since the commencement of the suit.[11]

§ 18. Evidence of Visits to Brothel.—Adultery may sometimes be inferred from evidence showing visits by the defendant to houses of prostitution; for in the absence of all proof to the contrary, the natural and reasonable presumption is that he went there for the purpose indicated by the character of the house.[12] Thus evidence of inti-

5. Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035.

6. Bennett v. Bennett, 32 Cal. App. Dec. 948, 192 Pac. 180; Johanson v. Johanson, 12 Cal. App. 635, 108 Pac. 55.

7. Baker v. Baker, 13 Cal. 87.

8. Hilton v. Hilton, 36 Cal. App. Dec. 64, 201 Pac. 337.

9. See infra, § 89.

10. 9 Ruling Case Law, 332. See Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672, where it is said that where the evidence upon the part of the plaintiff consists in the main of the testimony of one who appears, according to his own statement, to be living upon the bounty of the plaintiff, and who states under oath that he is the party with whom the defendant committed the acts of adultery, it is of such startling character and comes from such a source as to demand the most careful review whenever and wherever presented before a court of justice.

11. Fuller v. Fuller, 17 Cal. 605.

12. Evans v. Evans, 41 Cal. 103.

macy with a public prostitute, together with evidence of visits paid her in the house where she lived, is sufficient to establish adultery.[13] Where adultery is charged in particular houses of ill-fame, evidence is admissible of visits to other similar houses to show the habits and inclinations of the defendant, and as bearing upon the probability of the evidence in support of the specific charges.[14] But evidence of visits to other brothels after suit brought can only be admissible to show that the visit alleged was adulterous, and where the contrary is shown, such evidence cannot establish the cause of action, and may be excluded.[15]

Evidence of visits by a defendant to brothels casts upon him the burden of showing the object and purpose of his visit, if they were innocent.[16] Yet it has been said that the mere fact that a married man enters a house of prostitution in the evening and remains all night raises so strong a presumption of adulterous intercourse as to require the most satisfactory evidence to rebut it.[17]

§ 19. Testimony Showing Illegitimacy of Children.— It is the rule that "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate,"[18] and that evidence tending to establish the illegitimacy of such issue, under such circumstances, is incompetent and inadmissible where the legitimacy of the offspring is in issue.[19] But this rule has no application in a suit for divorce on the ground of adultery, even though the evidence offered in support of the charge tends to disclose the illegitimacy of the offspring. In other words,

13. Davis v. Davis, 151 Cal. 548, 91 Pac. 485.

14. Johanson v. Johanson, 12 Cal. App. 635, 108 Pac. 55, citing Carpenter v. Carpenter, 56 Hun, 643, 9 N. Y. Supp. 583.

15. Johanson v. Johanson, 12 Cal. App. 635, 108 Pac. 55.

16. Johanson v. Johanson, 12 Cal. App. 635, 108 Pac. 55.

17. Evans v. Evans, 41 Cal. 103.

18. Code Civ. Proc., § 1962, subd. 5.

19. See ILLEGITIMACY.

a husband seeking a decree of divorce from his wife because of her adultery may prove his case precisely as any other issue of fact may be proved—that is to say, he may prove it by any relevant fact or circumstance which he may in a competent manner be able to present, even though he thereby discloses the illegitimacy of children born to her. He may, therefore, prove declarations made by her to the effect that there had been no sexual relations maintained between herself and her husband for a period of years prior to and down to the date of the birth of the child last born to her.[20]

§ 20. Evidence of Character.—While the general rule is that in civil actions evidence of character of neither party thereto is admissible,[1] and the authorities generally are in conflict as to whether the charge of adultery in an action for divorce constitutes an exception to the rule, the question in California is controlled by section 2053, Code of Civil Procedure, which reads:

"Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character."

A charge of adultery does not put in issue the character of the party accused and evidence concerning it, under this section, is inadmissible. And since the corespondent is not a party to the action, evidence of the excellence of his character is properly rejected, unless he, as a witness, has been impeached.[2]

Cruelty.

§ 21. What Constitutes Cruelty Generally.—The code does not attempt sharply to define or to make definite limitations of the phrase "extreme cruelty," as that term

20. Hilton v. Hilton, 36 Cal. App. Dec. 64, 201 Pac. 337, per Hart, J.

1. See EVIDENCE.

2. Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260.

is used in section 92 of the Civil Code, enumerating the causes for divorce.[3] It merely declares in general terms that

"Extreme cruelty is the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage."[4]

Nor have the courts found it possible to define with precision what acts will constitute extreme cruelty. The habits and dispositions of different married persons vary so much that it is impossible to lay down any universal rule for the determination of what indignities should be regarded as grounds of divorce under the statute. The legislature has necessarily employed general words, and left each case to be determined, according to its own peculiar circumstances, by the good sense and judgment of courts and juries.[5] Formerly, it was said that extreme cruelty meant the same thing as the "saevitia" or "cruelty" of the English ecclesiastical courts,[6] and it was defined as such conduct in one of the married parties as rendered further cohabitation dangerous to the physical safety of the other, or created in the other such reasonable apprehension of bodily harm as naturally interfered with the discharge of marital duty.[7] But this definition is not in accord with the present statute allowing a divorce for mental as well as physical cruelty.[8]

Perhaps extreme cruelty may be said to be such conduct of one of the parties, whether manifested by words

3. Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298.

4. Civ. Code, § 94. See note, 3 A. L. R. 803, as to forcing spouse to get rid of child by former marriage as cruelty constituting ground for divorce.

5. Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 556. And see Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Lord v. Lord, 1 Cal. Unrep. 417; Gaskins v. Gaskins, 1 Lab. 381, to the same effect.

6. Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615.

7. Powelson v. Powelson, 22 Cal. 358 (quoting from Bishop on Marriage and Divorce, § 454); Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615.

8. See infra, § 25, as to mental suffering constituting cruelty.

alone, or by personal violence, or by both, as by the common understanding and judgment of mankind, living in civilized societies, ought not to be borne or tolerated by the other.[9] Under the code definition, set out above, the infliction of grievous bodily injury or grievous mental suffering must be "wrongful," for it would, of course, be unreasonable to hold that every infliction of grievous bodily injury or mental suffering should be a sufficient ground for divorce, whether or not it results from the inadvertent or justifiable conduct of the other party to the marital relation.[10] Ordinarily, what constitutes extreme cruelty is a mixed question of law and fact.[11] The conduct constituting a cause of divorce is a matter of law;[12] and it is a question of fact whether the evidence shows such conduct.[13]

§ 22. Motive and Intent.—The code definition of the term "extreme cruelty"[14] seems to import acts directed toward the other party with malevolent motive. It has been said to be conceivable that a case might be imagined which would fall within the meaning of the words without such motive, nevertheless as to self-directed acts or omissions which do not impair or constitute a menace to the health of the other spouse or interfere with the consummation of the marriage relation, the language used should not

9. Gaskins v. Gaskins, 1 Lab. 381.

10. Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099. See infra, § 35.

The word "wrongful" was inserted before the word "infliction" by an amendment of section 94 of the Civil Code, in 1905, probably to meet the criticism of the code definition in Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858.

11. Kuhl v. Kuhl, 124 Cal. 57, 56 Pac. 629.

12. Kuhl v. Kuhl, 124 Cal. 57, 56 Pac. 629.

13. Franklin v. Franklin, 140 Cal. 609, 74 Pac. 155; Curl v. Curl, 130 Cal. 638, 63 Pac. 65; Kuhl v. Kuhl, 124 Cal. 57, 56 Pac. 629; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099.

14. See supra, § 21.

be construed as referring to traits of character, habits of cleanliness, or conditions of bodily health, as to all of which, unless otherwise provided by statute, the parties must be deemed to have assumed the burden of informing themselves by association, acquaintance, and inquiry before entering into a contract of such vital importance, not only to themselves, but to society in general.[15] On the other hand, where the acts of cruelty are deliberately committed, it is no excuse that it was not intended thereby to annoy the innocent spouse. So it has been held that where the voluntary conduct of a husband is inconsistent with marital integrity it is conclusively presumed that he intended the natural and ordinary effect thereof upon his wife, and the law will not condone his offense on the ground that his acts were not willfully done to annoy or vex her and that he did not suppose any publicity would be given to them or that she would be told about them.[16]

§ 23. Physical Violence.—The degree of physical violence which constitutes extreme cruelty is not entirely clear. Of course, an act of physical cruelty which is technical rather than real will not authorize a divorce.[17] The old common-law authors insisted that there must be personal assault and battery, and even this was permissible provided the stick used was not larger than the thumb or forefinger. But the present condition of refined society does not admit of this severity of construction.[18] It has been said that physical violence, to authorize a divorce, must be attended with danger to life, limb or health or be such as to cause reasonable apprehension of future danger; for a divorce is not authorized for every slight violence which an angered husband may commit against his

15. Dahnke v. Dahnke, 36 Cal. App. Dec. 587, 202 Pac. 894, per Shaw, J.

16. Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566.

17. Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582.

18. Pursley v. Pursley, 1 Lab. 52.

wife.[19] But it has been held that such acts of cruelty need not be persistent, nor become a fixed habit, before relief and safety can be had by divorce;[20] and that a husband is guilty of extreme cruelty if on several occasions he inflicts violence upon the person of his wife so that the marks remain for several days.[1]

§ 24. Acts Causing Apprehension of Injury.—Extreme cruelty embraces not only physical violence actually inflicted upon the complaining party by the other, but also any conduct in one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation under such circumstances might be attended with bodily harm committed by one upon the other.[2] Courts do not interfere in these cases, it has been said, so much to punish an offense already committed, as to relieve the complaining party from an apprehended danger.[3] The effect of an act of alleged cruelty is the criterion by which it must be tested. If the act is such as to create a reasonable apprehension of bodily harm, it will justify a divorce, even in the absence of any proof of actual violence.[4] Under this rule threats of bodily injury may be considered on the issue of extreme cruelty.[5] The fact, however, that the complaining spouse lived with the defendant for a

19. Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615. See note, 5 A. L. R. 712, as to conduct amounting to treatment endangering life within statute defining grounds for divorce.

20. Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91, holding that an instruction that "The acts must be persistent, and the cruelty must be so extreme in its nature that in itself it furnishes an apprehension that the continuance of the cohabitation would be attended with bodily harm to the wife," was too strong.

1. Eidenmuller v. Eidenmuller, 37 Cal. 364; Knapp v. Knapp, 23 Cal. App. 10, 136 Pac. 719.

2. Powelson v. Powelson, 22 Cal. 358; Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615; Crum v. Crum, 38 Cal. App. Dec. 89, 207 Pac. 506.

3. Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615, citing Bishop on Marriage and Divorce, § 456.

4. Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615.

5. Gaskins v. Gaskins, 1 Lab. 381.

long time after the act complained of warrants the conclusion that he did not regard himself in peril or danger.[6]

§ 25. Acts Causing Mental Suffering.—Under section 94 of the Civil Code extreme cruelty may consist of the wrongful infliction of "grievous mental suffering," upon the other by one party to the marriage. The language of this section is plain, and cannot be properly construed as declaring that only grievous bodily injury shall constitute extreme cruelty, and that extreme mental suffering which is not shown to have injuriously affected the body or health of the complaining party is not sufficient. While it was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary, the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as seriously to impair the health, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statutes.[7] Section 94 of the Civil Code is in harmony with the law as thus stated, and under it the infliction of grievous mental suffering, alone is extreme cruelty.[8]

6. White v. White, 82 Cal. 427, 6 L. R. A. 756, 23 Pac. 276.

7. Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298 (quoting Carpenter v. Carpenter, 30 Kan. 712, 744, 46 Am. Rep. 108, 2 Pac. 122). See, also, MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927, to similar effect.

8. Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330; MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Smith v. Smith, 124 Cal. 651, 57 Pac. 573; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499; Crum v. Crum, 38 Cal. App. Dec. 89, 207 Pac. 506; McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460.

While it is true that there is no scale by which to gauge the purely mental susceptibilities and sufferings of another, it is not necessary that there should be any such exact measure. The common judgment of mankind recognizes the fact that there may be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made.[9] Whether in any given case there has been inflicted this "grievous mental suffering" is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given.[10] A correct decision must depend upon the sound sense and judgment of juries and courts.[11] And the findings on such questions cannot be disturbed on appeal unless the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court.[12]

9. Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298.

10. Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330; MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Curl v. Curl, 130 Cal. 638, 63 Pac. 65; Blair v. Blair, 122 Cal. 57, 54 Pac. 369; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; Davis v. Davis, 38 Cal. App. Dec. 323, 207 Pac. 923; Van Camp v. Van Camp, 35 Cal. App. 301, 199 Pac. 885; McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460; Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582.

11. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858 (dissenting opinion, per McFarland, J.).

12. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Blair v. Blair, 122 Cal. 57, 54 Pac. 369; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Barnes v. Barnes, 95

§ 26. Necessity for Impairment of Health by Mental Suffering.—In the earlier decisions of the California supreme court, in consonance with the ancient rule, it was in effect announced that there could be no extreme cruelty as a result of mental irritation until a perceptible effect had been produced upon the body or health of the complaining party, the reason being, it was said, that no scale by which to gauge the purely mental susceptibilities and sufferings has been discovered, except such as indicated the degrees thereof by their perceptible effects on the physical organization of the body.[13] The supreme court receded from this position when it considered a case which is now regarded as the leading one in California on the subject of mental cruelty. In the opinion there it was said:

"The common judgment of mankind recognizes the fact that there may be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made. Whether in any given cases there has been inflicted this 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party."[14]

Cal. 171, 16 L. R. A. 660, 30 Pac. 298; Davis v. Davis, 38 Cal. App. Dec. 323, 207 Pac. 823; McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 450; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425.

13. Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858, citing Powelson v. Powelson, 22 Cal. 358; Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615, and stating: "Although the character of the ill treatment, whether it operates directly upon the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of its sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party."

14. Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298 (overruling Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858). See Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483, per James, J., reviewing the decisions.

§ 27. Effect of Station in Life or Refinement of Parties. Extreme cruelty is a term of relative meaning, and a course of conduct which would inflict grievous mental suffering upon one person might not have that effect upon another. Hence no fixed legal rule for determining its existence in any given case can be laid down. The question is one for determination in the first instance by the judge who tries the action, and has the parties before him for observation in the light of the evidence.[15] Ordinarily, acts and conduct of either spouse, unjustifiable under a reasonable rule of marital behavior, which in any case may cause great physical suffering or mental torture, are sufficient to sustain a charge of extreme cruelty. This is stated as a general proposition, but it is subject always to the qualification that conduct which may in one case cause such suffering may not, in another, have the same effect. Thus the use of vulgar and profane epithets may, in the case of a highly cultured, refined and sensitive woman, produce an effect of great mental anguish; while the same conduct may not, in the case of a woman of no refinement and of coarse nature, have any such effect at all. In the first case the charge of extreme cruelty might be sustained by the evidence, whereas, in the second case it would not be.[16] Hence where a plaintiff relies solely upon mental cruelty, the trial court may properly take into consideration the social conditions of the parties and the probability of the

And see MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183 (holding that where there was evidence tending to sustain the allegations of the complaint as to the acts and probative facts of cruelty causing the grevious mental suffering alleged, and the court found that they were committed by the defendant, and that defendant, by his conduct, willfully inflicted upon plaintiff grievous mental pain and suffering, "thereby impairing her health," the finding as to the impairment of plaintiff's health is unnecessary, and it is immaterial whether that part of the finding was or was not justified by the evidence).

15. Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582. See supra, § 21.

16. Van Camp v. Van Camp, 35 Cal. App. Dec. 301, 199 Pac. 885.

plaintiff suffering mental cruelty from the acts complained of.[17] While mere incompatibility of temperament is not itself ground for divorce, it is well recognized, especially in the modern cases, that the jury, or the court sitting as a trier of the facts, in determining whether the circumstances show cruelty should always keep in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party.[18] The conduct of a spouse, however, may be such as to constitute extreme cruelty regardless of the refinement of the complaining party. In that event no finding as to his or her refinement is necessary.[19]

§ 28. Verbal Abuse.—While formerly it was said that language alone could not constitute extreme cruelty in the absence of some act of personal violence committed, the rule, in modern times, has been so relaxed, that words alone of an insulting, opprobrious and injurious character have been declared to constitute, of themselves, extreme cruelty.[20] Yet it may be that in order to secure a divorce on the ground of cruelty, based upon words unaccompanied by violence, it is incumbent upon the plaintiff to prove that

17. Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Huchting v. Huchting, 46 Cal. App. 194, 188 Pac. 1002; Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582. Illustrations of the principles stated in this section are given throughout this subdivision.

18. Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; Van Camp v. Van Camp, 35 Cal. App. Dec. 301, 199 Pac. 885. See infra, § 29, as to incompatibility of temperament as a ground for divorce.

19. See Polakoff v. Polakoff, 34 Cal. App. Dec. 492, 196 Pac. 778, holding that where the court finds that the husband entered the wife's home in a rude and violent manner, and without any cause or reason therefor called her abusive names and struck her violently several times, and dragged her out of the house and down the steps, thereby inflicting upon her great pain and mental anguish and suffering to establish mental cruelty, it is not necessary further to find that the wife was a refined and sensitive woman.

20. Gaskins v. Gaskins, 1 Lab. 381. See note, 3 A. L. R. 993, as to abuse by relatives of other spouse as cruelty constituting ground for divorce.

the charges were malicious and without justifiable or probable cause.[1] Calling the wife harsh and opprobrious names and applying to her vile and indecent epithets may constitute extreme cruelty, especially when considered in connection with other acts of cruelty.[2] Of course the question depends, in a large measure, upon the relations, mode of life and characters of the parties,[3] and the effect of the language used may be mitigated by the drunkenness of the offending spouse, or by the absence of other persons at the time.[4]

§ 29. **Incompatibility of Temperament—Nagging.**—In accord with the general rule that the marriage relation will not be dissolved for trivial matters,[5] a divorce will not be granted merely because of incompatibility of temperament.[6] Mere austerity of temper, petulance of man-

1. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927 (point assumed but not decided). See also infra, § 35.

2. Smith v. Smith, 124 Cal. 651, 57 Pac. 573; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767 (personal abuse during pregnancy); Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499; Cooper v. Cooper, 88 Cal. 45, 25 Pac. 1062; Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858 (divorce denied on the ground that the personal abuse of the plaintiff did not have any injurious effect upon her body or health, but this point was later overruled in Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298); Powelson v. Powelson, 22 Cal. 358; Crum v. Crum, 38 Cal. App. Dec. 89, 207 Pac. 506; Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304; Johnson v. Johnson, 4 Cal. Unrep. 446, 35 Pac. 637; Pursley v. Pursley, 1 Lab. 52.

3. Hale v. Hale, 60 Cal. Dec. 551 (saying that it is very unlikely that the plaintiff was seriously pained by the verbal abuse by her husband no matter how profane or violent, where the joint business of the parties throughout their married life had been that of keeping houses of assignation); Smith v. Smith, 124 Cal. 651, 57 Pac. 573; Powelson v. Powelson, 22 Cal. 358; Crum v. Crum, 38 Cal. App. Dec. 89, 207 Pac. 506; Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582; Pursley v. Pursley, 1 Lab. 52. See supra, § 29.

4. Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858 (overruled on another point in Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298).

5. See supra, § 8.

6. Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483; Blanchard

ner, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, do not amount to that cruelty against which the law can relieve.[7] Yet continuous nagging of one spouse by the other may constitute cruelty giving ground for divorce, even though the motives of the offending spouse were good, since nagging from good motives may be just as hurtful as nagging from any other kind of motives.[8]

§ 30. Desertion, Intemperance and Uncleanliness. — Aside from desertion as a specific ground for divorce,[9] it seems that a specific absence of one spouse from the family home, without the knowledge or consent of the other, may constitute extreme cruelty, under certain circumstances.[10] In any event, the absence of a spouse may be properly considered in connection with other acts constituting cruelty, all of which together may furnish a good cause of action.[11]

Intemperance.—Frequent intoxication even though insufficient to furnish ground for divorce upon the ground of habitual intemperance may furnish sufficient basis for a divorce upon the ground of extreme cruelty, where such

v. Blanchard, 10 Cal. App. 203, 101 Pac. 536.

7. Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858; Blanchard v. Blanchard, 10 Cal. App. 203, 101 Pac. 536.

8. Barngrover v. Barngrover, 37 Cal. App. Dec. 407, 206 Pac. 461, per Sturtevant, J., holding nagging by "an earnest Christian woman," growing out of her ultra-Puritanical character, and extending over a period of ten years, is a sufficient cause for divorce.

9. See infra, § 36 et seq.

10. Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425. See Smith v. Smith, 62 Cal. 466, holding that the fact that wife deserted her husband and children, and went to Germany, for the purpose of perfecting herself in the art of painting, and was abroad about three months, did not of itself constitute such cruelty as entitled the plaintiff to a divorce. Referring to the Smith case, the court in the Dupes case said that it does not purport to establish a rule of evidence, nor attempt to state a positive rule of law to be applied to other similar cases where the conditions are not identical.

11. Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304.

conduct is shown to have caused the other spouse mental anguish.[12] And in pleading a cause of action for a divorce on the ground of extreme cruelty, allegations of excessive drinking of liquors may be coupled with other acts which, in themselves, amount to extreme cruelty.[13] Inasmuch, however, as "habitual intemperance" and "extreme cruelty" are separate grounds of divorce, the pleading of certain instances of voluntary intoxication in connection with other matters as constituting acts of cruelty cannot be regarded as a sufficient allegation of a cause of action for habitual intemperance, and uphold a finding thereof.[14]

Personal Uncleanliness.—Personal uncleanliness is not ordinarily regarded as an act of extreme cruelty authorizing a divorce.[15]

§ 31. Sexual Matters and Immoral Conduct.—Formerly it was said that adultery did not, in a legal sense, constitute extreme cruelty; and that allegations of adulterous conduct which fell short of actual adultery, did not constitute a good cause of action for extreme cruelty.[16] But

12. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120 (explaining Haskell v. Haskell, 54 Cal. 262); Delatour v. Mackay, 139 Cal. 621, 73 Pac. 454; Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858 (holding that where mental suffering produced by drunkenness merely, is not complained of, intemperance cannot be considered); Cassidy v. Cassidy, 63 Cal. 352; Bennett v. Bennett, 36 Cal. App. Dec. 745, 203 Pac. 162. As to habitual intemperance as a specific cause of divorce, see supra, § 15.

13. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120; Delatour v. Mackay, 139 Cal. 621, 73 Pac. 454. See infra, § 74.

14. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120; Haskell v. Haskell, 54 Cal. 262.

15. Dahnke v. Dahnke, 36 Cal. App. Dec. 587, 202 Pac. 894, holding that the husband's failure to bathe as often as his wife thought necessary, unless she prepared the bath and insisted upon his so doing and the fact that he was afflicted with a skin trouble, which condition differed from that of normal individuals only in the degree of exfoliation, do not constitute extreme cruelty.

16. Haskell v. Haskell, 54 Cal. 262. And see Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858. As to adultery as a

this can no longer be said to be the rule in California, in view of the modern doctrine that any conduct which wrongfully inflicts grievous mental suffering constitutes extreme cruelty.[17] While the mental suffering in such a case is ordinarily caused by the fear that the bond of affection between the spouses may be thus broken, this is not necessarily so and the suffering may be predicated upon the comments and gossip of others and upon the humiliation sustained by the plaintiff.[18] If a spouse brings an improper person into the home over the protest of the other, and retains him or her there under such circumstances as to inflict great mental suffering upon the other, this constitutes extreme cruelty justifying a divorce.[19] The same is true where one communicates a loathsome venereal disease to the other.[20]

§ 32. Charges of Misconduct.—A false charge by one spouse of misconduct on the part of the other is extreme cruelty if it causes grievous mental suffering.[1] These

cause for divorce, see supra, § 16 et seq.

17. Curl v. Curl, 130 Cal. 638, 63 Pac. 65; Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; Bennett v. Bennett, 36 Cal. App. Dec. 745, 203 Pac. 162; Van Camp v. Van Camp, 35 Cal. App. Dec. 301, 199 Pac. 885 (holding that the husband's acts toward a corespondent may be shown on the issue of extreme cruelty); Huchting v. Huchting, 46 Cal. App. 194, 188 Pac. 1002.

18. Van Camp v. Van Camp, 35 Cal. App. Dec. 301, 199 Pac. 885. See Fleming v. Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124, holding that it cannot be said that the defendant's conduct did not inflict grevious mental suffering upon his wife, where he attempted to have sexual intercourse with their domestic, who filed a complaint before a magistrate charging the defendant with assault with intent to commit a rape, and that afterwards the defendant threatened to turn the plaintiff out upon the world penniless unless she would help him to keep the domestic from prosecuting him on the complaint.

19. Palmer v. Palmer, 34 Cal. App. Dec. 334, 196 Pac. 89; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402.

20. The testimony of the wife that she had such a disease is sufficiently corroborated by the testimony of her physician that he had treated her for it. Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499.

1. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102

charges may be made in a complaint in a prior divorce suit,[2] and otherwise, though an action based on charges made in a former action cannot be maintained until the termination of such action, and trial of such charges therein.[3] Such charges may consist of a charge of wrongful conduct,[4] of contracting a venereal disease through illicit intercourse with other persons,[5] or of communicating such disease to the spouse making the charge,[6] or of infidelity generally.[7] But in any case such a charge will not constitute a cause for divorce unless it is unjustified,[8] and causes grievous mental suffering to the innocent party.[9] And these are matters of fact to be determined in a proceeding in which these issues are raised.[10] Whether grievous mental suffering was caused depends upon the sensibilities of the parties charged.[11] And while it would seem that charges of adultery falsely made

Pac. 927; Haley v. Haley, 2 Cal. Unrep. 761, 14 Pac. 92.

2. Cooper v. Cooper, 88 Cal. 45, 25 Pac. 1062, stating that charges made in a complaint in an action for divorce were untrue will be presumed where the action is voluntarily dismissed by the plaintiff.

3. De Haley v. Haley, 74 Cal. 489, 5 Am. St. Rep. 460, 16 Pac. 248 (reversing the decision in 2 Cal. Unrep. 761, 14 Pac. 92). See infra, § 68.

4. Polakoff v. Polakoff, 34 Cal. App. Dec. 492, 196 Pac. 778.

5. Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183. See notes, 5 A. L. R. 1016, and 8 A. L. R. 1540, as to venereal diseases as ground for divorce or annulment of marriage.

6. Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304.

7. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927.

8. Stampfli v. Stampfli, 35 Cal. App. Dec. 360, 199 Pac. 829; Gray v. Gray, 185 Cal. 598, 197 Pac. 945 (holding accusation unjustified under the facts); Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402, holding that the defendant may introduce in evidence as tending to contradict the allegations of the complaint letters by the wife to her paramour, and testimony of persons who had seen her in bed with him.

9. Brandt v. Brandt, 178 Cal. 548, 174 Pac. 55 (citing 9 Ruling Case Law, 345).

10. Brandt v. Brandt, 178 Cal. 548, 174 Pac. 55; MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927.

11. Smith v. Smith, 124 Cal. 651, 57 Pac. 573, Garoutte, J.; Powelson v. Powelson, 22 Cal. 358; Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582; Pursley v. Pursley, 1 Lab. 52. See supra, § 29.

by the wife against her husband are not deemed as serious in proving cruelty on her part as when made by the husband,[12] still they should be given material consideration; and the courts have granted divorces to husbands where such charges seemed to have been the gravamen of the wife's offense, though other elements entered into the cases.[13] The granting of such relief to the husband would seem especially appropriate where the charges include other acts of gross immorality.[14] Accusations of infidelity made against the wife in the presence of third persons or disseminated among her friends have been held to constitute extreme cruelty where the wife's conduct did not warrant the charge.[15] But the mere fact that a husband and wife are living apart when false charges of adultery are wantonly made by one against the other does not of itself prevent such charges from constituting extreme cruelty.[16] And a false charge of adultery made in a former action which is set up as a ground of cruelty is not to be considered as stale, although the parties had, subsequent to such former action, lived together as husband and wife, where there was subsequent misconduct which caused, and was calculated to cause, great mental suffering.[17]

12. See 9 Ruling Case Law, 128.

13. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927. And see Brandt v. Brandt, 178 Cal. 548, 174 Pac. 55; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402.

14. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298.

15. Gray v. Gray, 185 Cal. 598, 197 Pac. 945; Stampfli v. Stampfli, 35 Cal. App. Dec. 360, 199 Pac. 829; Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304; Gaskins v. Gaskins, 1 Lab. 381; Pursley v. Pursley, 1 Lab. 52. And see Smith v. Smith, 124 Cal. 651, 57 Pac. 573; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499; Haley v. Haley, 67 Cal. 24, 7 Pac. 3; Powelson v. Powelson, 22 Cal. 358.

16. Macdonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927. See infra, § 33.

17. Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402.

§ 33. Acts Committed After Separation of Spouses.—While there is some authority in other jurisdictions in support of the contrary view, the better doctrine, and the rule in California, is that the mere fact that the parties are living separate and apart when false charges are maliciously made by one spouse against the other does not necessarily prevent them from constituting extreme cruelty, and is relevant only in the determination of the question whether they inflicted grievous mental suffering.[18] It is said that the fact that the parties are separated at the time the charges are made does not change the nature of the cruelty, for separation does not relieve the husband of the duty to protect his wife's reputation.[19] The question whether a false and malicious charge made by the defendant against the plaintiff, after they had actually separated, would be less apt to inflict grievous mental anguish for that reason, is for the trial court to determine, in view of all the facts.[20]

The rule here discussed would seem equally applicable to any acts of cruelty committed after the parties have separated. The mere fact that the parties were living separate and apart from each other affords no justification.[1]

§ 34. Number of Acts.—Although elsewhere there is authority, to the contrary, it is not the rule in California that the law does not permit a divorce on the ground of extreme cruelty for any single act of violence or abuse. It is manifest that a single act of cruelty may be of such

18. MacDonald v. MacDonald, 155 Cal. 665; Haley v. Haley (Cal.), 14 Pac. 92; Valensin v. Valensin, 73 Cal. 106; Gaskins v. Gaskins, 1 Lab. 381. See Kuhl v. Kuhl, 124 Cal. 57, holding that a charge by a wife that the husband stole her property, made after his desertion under circumstances affording reasonable grounds for such belief, does not amount to extreme cruelty and form any excuse for his desertion.

19. MacDonald v. MacDonald, 155 Cal. 665, quoting Nelson on Divorce and Separation, § 277.

20. Valensin v. Valensin, 73 Cal. 106. See supra, § 27.

1. Newby v. Newby, 36 Cal. App. Dec. 652, 202 Pac. 891.

a nature, even where the act consists solely of the making of unfounded charges and cruel imputations, as not only to inflict the most grievous mental suffering, but also to render impossible the subsequent living together of husband and wife upon any such terms as are essential to the accomplishment of the legitimate ends and objects of matrimony, if marriage is to be viewed from a different standpoint than as a mere physical relation.[2] Sometimes a single act of physical cruelty of and by itself is extreme cruelty; as where the husband severely beats his wife, or otherwise inflicts a serious bodily injury upon her.[3] Yet commonly, with one or a few acts pre-eminently reprehensible, conduct constituting cruelty is the sum of the entire conjugal life.[4] An accumulation of acts, all of an unkind, harsh or cruel character, none of which would, by itself, authorize a divorce, may, when considered together, constitute extreme cruelty. And also, when the mere acts complained of would not, by themselves, even when considered together, authorize the relief sought, yet the words and language by which they may have been accompanied

2. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927 (holding that it is extreme cruelty in a wife, when it causes her husband grievous mental pain and suffering, deliberately and maliciously to make a false charge against her husband in writing, for the sole purpose of lowering him in the estimation of his friends and associates and all decent people, to the effect that he is a drunkard, a lewd and dissolute character, a person unfit to be a member of any fraternal organization, or to associate with decent and respectable people, and that he had admitted to her that if it were not for his parents he would long ago have adopted the method of living on the earnings of a prostitute with whom, she charged, he had admitted having consorted after his marriage. Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298.

3. Polakoff v. Polakoff, 34 Cal. App. Dec. 492, 196 Pac. 778; Brewthauer v. Brewthauer, 45 Cal. App. 759, 188 Pac. 296; Gaskins v. Gaskins, 1 Lab. 381. See Hockerston v. Hockerston, 41 Cal. App. 195, 182 Pac. 325, holding the acts in question were done on one single occasion under the excitement of a sudden quarrel, and the circumstances were not such that, standing separate and alone, they constituted extreme cruelty.

4. Brewthauer v. Brewthauer, 45 Cal. App. 759, 188 Pac. 296, quoting 2 Bishop on Marriage and Divorce, § 1430.

must be also considered, and if of a character to wound the sensibilities and hurt the feelings, they may, in connection with the acts, make out the charge of extreme cruelty.[5]

§ 35. Justification or Excuse.—While courts might, in some cases, be inclined to show more charity toward a nervous and excitable spouse than toward others less mercurial of temperament, peculiarities of temperament do not excuse acts of cruelty.[6] However, provocation for such acts on the part of the complaining spouse is a material matter for consideration.[7] This is true, whether the cruelty alleged as a cause for divorce consists of harsh language[8] or of physical violence.[9] And, of course, where a husband, when assaulted by his wife, takes such physical action as is necessary to compel her to desist, without, however, inflicting any injury upon her, he is not guilty of cruelty.[10]

5. Gaskins v. Gaskins, 1 Lab. 381.

6. "The obligation is upon all men, whether they be nervous, phlegmatic, excitable, or habitually calm, to treat their wives decently." Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120, per Melvin, J., holding that an allegation in a complaint to the effect that the defendant "is a highly nervous and excitable man" is immaterial.

7. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546; Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858.

8. Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858 (overruled on another point in Barnes v. Barnes, 95. Cal. 171, 16 L. R. A. 660, 30 Pac. 298). In this case the conduct of the complaining spouse resulted from a mistaken view of the duty of a wife to make her husband, by means of censure, reproach and scolding, "do what was right." See note, 5 A. L. R. 719, as to misconduct of complainant defeating divorce on ground of threat endangering life.

9. Johnson v. Johnson, 14 Cal. 459 (citing Bishop on Marriage and Divorce, § 491); Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615; Jones v. Jones, 32 Cal. App. Dec. 1097, 192 Pac. 463, holding that to slap a wife does not constitute extreme cruelty where the act was committed in an altercation provoked by her, when without just cause she attempted to eject him from a room in his residence, and made a furious attack upon him, by striking, kicking and biting.

10. Knapp v. Knapp, 183 Cal. 51, 190 Pac. 362.

The common-law right of a husband to chastise his wife for the purpose of correction is not recognized in this country.[11] And it is unlawful for him without reasonable cause or without excuse or provocation to inflict bodily injury upon his wife.[12]

Willful Desertion.

§ 36. In General.—Willful desertion, as a cause for divorce, is defined in the Civil Code to be "the voluntary separation of one of the married parties from the other with intent to desert."[13] While this definition is very imperfect in itself, its meaning is clear enough when taken in connection with the succeeding sections of the code setting forth the different classes of facts which may manifest such desertion.[14] The offense of desertion is obviously composed of, first, an actual breaking off of the matrimonial cohabitation, and, second, an intent to desert in the mind of the offender, both of which must combine to make the desertion complete.[15] The desertion, to constitute a ground for divorce, must be "willful," that is to say intentional, and wrongful—without sufficient justification or excuse;[16] and it must continue for one year.[17] The intent to desert may be presumed from

11. 9 Ruling Case Law, 353; Knapp v. Knapp, 23 Cal. App. 10, 136 Pac. 719; Pursley v. Pursley, 1 Lab. 52.

12. Knapp v. Knapp, 23 Cal. App. 10, 136 Pac. 719, per Burnett, J.

13. Civ. Code, § 95; Greer v. Greer, 142 Cal. 519, 77 Pac. 1106; Andrews v. Runyon, 65 Cal. 629, 4 Pac. 669; Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234.

14. Sheridan v. Sheridan, 134 Cal. 88, 66 Pac. 73.

15. Benkert v. Benkert, 32 Cal. 467 (quoting Bishop on Marriage and Divorce, § 506). And see Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367; Morrison v. Morrison, 20 Cal. 431; Hardenbergh v. Hardenbergh, 14 Cal. 654; Bibb v. Bibb, 39 Cal. App. 406, 179 Pac. 214, to the same effect. See note, 12 A. L. R. 1391, as to desertion as affected by intimations of a possible consent to the renewal of marital relations in the future.

16. Benkert v. Benkert, 32 Cal. 467, holding the word "willful" does not imply any malice or wrong toward the other party.

17. Civ. Code, § 107; Borden v. Borden, 166 Cal. 469, 137 Pac. 27; McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Hardy v. Hardy,

proof of the fact of abandonment without apparent cause.[18] Consequently a desertion is made out when it is shown that the absence commenced and has continued during the prescribed period, without the consent and against the objections of the other party, and without justification or excuse.[19] The intent to desert need not exist prior to the separation but may be formed afterwards. In the language of the code,

"Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation."[20]

§ 37. **How Desertion is Manifested.**—Under section 96 of the Civil Code desertion may be manifested either by the

"Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary,[1] or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal."[2]

97 Cal. 125, 31 Pac. 906; Wright v. Wright, 35 Cal. App. Dec. 125, 199 Pac. 44 (holding that a declaration made by the defendant two months before the trial to the effect that "he was not going back home any more, he was through there," being made within the year prior to the commencement of the action, is not sufficient to show that the desertion of the defendant began at a date remote enough to mark the commencement of the statutory period); Porter v. Porter, 35 Cal. App. Dec. 53, 198 Pac. 1006; Zartarian v. Zartarian, 47 Cal. App. 90, 190 Pac. 196 (holding that a divorce cannot be based upon a cross-complaint alleging desertion where it appears that such cause of action had not accrued, either at the time of the filing of plaintiff's complaint or defendant's cross-complaint). Silva v. Silva, 32 Cal. App. 115, 162 Pac. 142.

18. Morrison v. Morrison, 20 Cal. 431.

19. Benkert v. Benkert, 32 Cal. 467.

20. Civ. Code, § 100. Borden v. Borden, 166 Cal. 469, 137 Pac. 27; Wright v. Wright, 35 Cal. App. Dec. 125, 199 Pac. 44.

1. See Morrison v. Morrison, 20 Cal. 431 (holding that desertion is the cessation of matrimonial cohabitation, and the intent to desert).

2. Keesey v. Keesey, 160 Cal. 727, 117 Pac. 1054.

With reference to the first mode in which desertion may be manifested, the refusal of matrimonial intercourse must be persistent[3] and unjustifiable, for it is settled that the qualifying clause of section 96 of the Civil Code, above quoted—"when there is no just cause for such refusal"—applies equally to either of the refusals therein specified.[4] And under the express terms of the code the refusal of matrimonial intercourse is not desertion when health or physical condition makes such refusal reasonably necessary. The burden therefore rests on the plaintiff to show that health and physical condition did not make refusal reasonably necessary.[5] Persistent refusal on the part of one spouse to have reasonable matrimonial intercourse with the other involves a continued willingness on the part of the one refused.[6] But when the evidence shows such refusal and a failure to seek a renewal of matrimonial intercourse, it is not necessary that there be proof of any solicitation to return to the marriage couch.[7]

Under the latter part of section 96 of the Civil Code, a wife is guilty of desertion if, without sufficient legal cause,

3. Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19, doubting whether an explained refusal of matrimonial intercourse by a bride for the period of three weeks can be said as matter of law to constitute such a persistent refusal as the statute contemplates, and which justifies the husband in separating from his wife.

4. Fink v. Fink, 137 Cal. 559, 70 Pac. 628.

In Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546, it is said: "Personally the writer of this opinion would incline to an interpretation of the statute whereby the words 'when there is no just cause for such refusal' would apply only to the refusal of either party to live in the same house with the other. But Fink v. Fink, 137 Cal. 559, 70 Pac. 628, seems to have settled the law the other way" (opinion per Melvin, J.).

5. Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19; Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234; Young v. Young, 23 Cal. App. 247, 137 Pac. 1065.

6. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546, holding that a finding that the wife persistently refused at all times to have matrimonial intercourse, but that the husband at all times "acquiesced" in such refusals, will be construed as meaning that he submitted thereto, and not that he approved thereof.

7. Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694.

she leaves the residence of the husband,[8] or if she refuses to follow and take up her residence with him when he has removed to a new home for business reasons,[9] but not where he departs from the home and forbids her to follow him, though she agreed thereto. And no desertion is proved by evidence of a declaration by the wife to the effect that she would not live with her husband while they are living together, or where within a short time thereafter they occupy the same house, although living in separate rooms.[10]

§ 38. **Effect of Cruelty, or Stratagem or Fraud.**—While desertion consists ordinarily of the act of the offending spouse in leaving the common residence, it is settled that under some circumstances the innocent party may, by leaving the other, put him or her in the position of having deserted in the legal sense of the term. In other words, the conduct of one of the parties may justify separation from him or her by the other, and confer the right upon the party leaving the other to obtain a divorce upon the ground of willful desertion.[11] Thus the code declares that

"When one party is induced, by the stratagem or fraud of the other party, to leave the family dwelling place, or to be absent, and during such absence the offending party departs with intent to desert the other, it is desertion by the party committing the stratagem or fraud, and not by the other."[12]

"Departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party."[13]

8. Lowman v. Lowman, 165 Cal. 352, 132 Pac. 439.

9. De Ville v. De Ville, 46 Cal. App. 441, 189 Pac. 297. See infra, § 47.

10. Keesey v. Keesey, 160 Cal. 727, 117 Pac. 1054. See infra, § 39.

11. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120; Benkert v. Benkert, 32 Cal. 467.

12. Civ. Code, § 97.

13. Civ. Code, § 98. Benton v. Benton, 122 Cal. 395, 55 Pac. 152.

Under the latter section it has been decided that where the wife, by reason of the husband's cruelty, lives apart from him, it is not necessary, in order to make his conduct desertion on his part, that he should entertain, in connection with his acts of cruelty, any settled purpose to drive her from him. It is enough if such is the natural consequence of his acts.[14] While accusations of improper relations with other women, and reproaches and threats based thereon, might justify a husband in leaving his wife, if such accusations are unfounded and due to no fault upon the part of the husband, it has been ruled that a man cannot by a course of improper conduct oft repeated arouse the suspicion and jealousy of his wife, and humiliate her by attentions to other women and then claim immunity from criticism and reproach.[15] In that case her objections will not justify a desertion, and the wife might base her action for divorce on the desertion, though she might also have based it upon adultery.[16]

§ 39. Separation by Consent.—It is settled that separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.[17] When parties so separate, the continuance of the

See Benkert v. Benkert, 32 Cal. 467, stating that when one party, by force or fraud, by acts, words or general conduct, causes or induces the other to break off the matrimonial cohabitation, he cannot complain, for the desertion is the result of his own wrong.

14. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120, containing an explanation of McVickar v. McVickar, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249, which seems to hold that when the cruelty justifies merely temporary absence on the part of the wife, the husband may cure the results of such cruelty by urging her to return; but stating that there is nothing in the opinion in that case which supports the theory that the wife must in every case accept the advances of her husband.

15. Bennett v. Bennett, 32 Cal. App. Dec. 948, 192 Pac. 180.

16. Holloway v. Holloway, 34 Cal. App. Dec. 553, 196 Pac. 926.

17. Civ. Code, § 99. Brautigam v. Brautigam, 181 Cal. 157, 183 Pac. 529 (holding that desertion is not established where the parties agreed to a separation, the husband's cruelty making it impossible for her to continue living with him); Lewis v. Lewis, 167 Cal. 732, 52 L. R. A.

separation does not give rise to a cause of action for divorce, until the consent of one is withdrawn,[18] and neither is entitled to a divorce on the ground of desertion,[19] for neither can say that the absence of the other was wrongful, at least not until the consent was revoked, though each may have intended to abandon the other.[20] The consent need not be expressed in writing, or even expressed in words, but it may be implied from the circumstances of the case.[1] As has been stated, "It may be implied from the failure of the parties to make overtures after a quarrel; from acquiescence in the separation; or from other circumstances which show the plaintiff's consent or that the separation was not against her will. The consent need not be express. It may be tacit, as where the plaintiff is willing and has made no objection."[2] It is for the court trying the case to determine from all the facts and circumstances appearing therein whether or not there was an absence of that consent to living separate and apart which is essential to constitute a desertion, and the acts, statements, and admissions of the parties subsequent to the cessation of cohabitation are clearly competent and material evidence in the determination of that question.[3]

(N. S.) 675, 141 Pac. 367 (where a husband left his wife because of his inability to support her, and the separation was, apparently, regarded as necessary and acquiesced in by the wife, there is no desertion); Borden v. Borden, 166 Cal. 469, 137 Pac. 27; Keesey v. Keesey, 160 Cal. 727, 117 Pac. 1054; Silva v. Silva, 32 Cal. App. 115, 162 Pac. 142. See note, 3 A. L. R. 503, as to desertion as affected by element of remonstrance or resistance.

18. Wright v. Wright, 35 Cal. App. Dec. 125, 199 Pac. 44. See infra, § 40, as to revocation of consent.

19. Turner v. Turner, 63 Cal. Dec. 1, 203 Pac. 109; Borden v. Borden, 166 Cal. 469, 137 Pac. 27.

20. Benkert v. Benkert, 32 Cal. 467.

1. Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367; Borden v. Borden, 166 Cal. 469, 137 Pac. 27; McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

2. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808, quoting Nelson on Divorce and Separation, § 67.

3. Borden v. Borden, 166 Cal. 469, 137 Pac. 27; McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808. See Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367, holding that where the evidence

This rule is equally applicable where a separation originally wrongful is consented to by the parties before the accrual of a cause of action for divorce.[4] An agreement of the parties to live apart is in the nature of a condonation of a prior desertion, and thereafter the parties deemed to be separated by consent until the consent of one of them is revoked. But an agreement after the accrual of the cause of action providing for a continued separation and an adjustment of property rights does not bar a divorce, where there was no condonation of the offense or offer to condone it, nor any connivance or collusion, beyond the terms of such agreement.[5]

§ 40. Revocation of Consent.—While there is no desertion, so long as the parties are living apart by agreement,[6]

"Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion."[7]

Any withdrawal of consent to a separation must necessarily be shown by the occurrence of some act or the

showed that the husband, a man of eighty-one years of age, had left his wife without any intention of returning, but that his departure was induced by his inability to support her, the court was justified in deciding that a case of willful desertion had not been made out, and in its inference that the separation was with the wife's acquiescence and consent.

4. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808; Silva v. Silva, 32 Cal. App. 115, 162 Pac. 142.

5. Walker v. Walker, 14 Cal. App. 487, 112 Pac. 479, holding that a provision in the contract by which the husband, as first party, "does hereby release and forever absolutely discharge said party of the second part from all claims and demands, action and causes of action of every kind whatsoever, as the wife of the party of the first part," does not by its terms include the cause of action for divorce against the wife for desertion; but, taking the contract in its entirety, and considering its terms, the intention was to discharge only causes of action involving property rights.

6. See supra, § 41.

7. Civ. Code, § 101. Borden v. Borden, 166 Cal. 469, 137 Pac. 27; McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808; Howard v. Howard, 134 Cal. 246, 66 Pac. 367; Wright v. Wright, 35 Cal. App. Dec. 125, 199 Pac. 44; Silva v. Silva, 32 Cal. App. 115, 162 Pac. 142.

making of some declaration indicating a change in the attitude of one or the other of the parties. The mere cessation of a husband's letters and remittances to his wife for more than a year prior to the commencement of the action is not sufficient to show an intent to desert her, particularly in view of section 175 of the Civil Code, which provides that a husband is not liable for the support of his wife when she is living separate from him by agreement unless such support is stipulated in the agreement.[8] If a reconciliation and restoration are, in good faith, sought by one party a refusal thereof becomes desertion.[9] This rule puts the recalcitrant spouse in default, and gives the other a right which he did not have under the previously existing circumstances; a right which, if such refusal be persisted in for the statutory period, will ripen into a cause for divorce.[10] A subsequent offer of reconciliation which was refused cannot defeat or render premature an action for divorce based upon an alleged desertion as of the date of a prior offer and refusal.[11] An acceptance of a subsequent offer within one year after the date of the prior offer and refusal would defeat the action, but an acceptance after the expiration of the year could not have that effect.[12] When subsequent to a separation the parties consent thereto and the consent is afterwards revoked, the desertion dates from such revocation, not from the original separation. The effect of such consent is precisely the same as though the defendant had returned to his home, and after the restoration of the marital relation for a time had again left with intent to desert the plaintiff.[13]

8. Wright v. Wright, 35 Cal. App. Dec. 125, 199 Pac. 44. See infra, §§ 160–166, as to separation agreements.

9. Borden v. Borden, 166 Cal. 469, 137 Pac. 27; Howard v. Howard, 134 Cal. 346, 66 Pac. 367.

10. Borden v. Borden, 166 Cal. 469, 137 Pac. 27; Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931.

11. Howard v. Howard, 134 Cal. 346, 66 Pac. 367.

12. Benkert v. Benkert, 32 Cal. 467.

13. Silva v. Silva, 32 Cal. App. 115, 162 Pac. 142.

§ 41. Effect of Solicitation of Condonation.

"If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal."[14]

This section requires the deserting spouse to solicit condonation; that is to say, not merely to seek a resumption of marriage relation, but to acknowledge fault, express regret, or seek forgiveness.[15] And he must do so in good faith,[16] and before the expiration of the period required to make the desertion a cause of divorce.[17] An offer to receive the offending party is not binding upon the injured party unless accepted and acted upon, and it may be withdrawn at any time before cohabitation is renewed.[18]

§ 42. Necessity for Good Faith in Solicitation.—While the law permits a spouse who deserts the other to repent and seek reconciliation and restoration, it requires that such offer be made in good faith.[19] An offer in good faith within the rule is an offer made for the purpose and with the genuine desire of resuming the conjugal relation, and not an offer made in the confident belief that it will be rejected, and for the mere purpose of evading a pecuniary obligation, or of laying the foundation for an action for

14. Civ. Code, § 102.

15. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297; McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554, holding that a bona fide offer by a deserting husband to return and provide a home for the wife, and expressing his willingness for a reconciliation, and offering to fulfill the marriage contract, with a request to her to do likewise, implies a request for "conditional forgiveness" which is condonation, and involves a solicitation of condonation for his offense of desertion.

16. See infra, § 42.

17. See infra, § 43.

18. Benkert v. Benkert, 32 Cal. 467.

19. Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322.

divorce.[20] However, the presumption of good faith attends upon every act, unless the surrounding circumstances are such as to overcome the presumption.[1] In this connection it has been said that while circumstances may be such as to excuse a spouse from visiting the other and making a personal effort toward an adjustment of difficulties which have separated them, the reasonable and proper course, and the one attended with the best results for harmony, is for the spouses to meet and adjust their difficulties themselves when it is possible. And where the plaintiff fails to do so and offers no valid excuse for his failure so to do, that fact is entitled to weight on the question of his good faith.[2] The law does not require an actual physical return, however, when the conduct of the other shows such a return would be fruitless.[3] Evidence showing the husband's relations with another woman is admissible upon the issue of good faith on the part of the husband in seeking a reconciliation with his wife.[4] But evidence of the former cruelty of the husband years prior to an agreement for separation and the offer of reconciliation is too remote, and is immaterial to the issue of desertion on her part, alleged as of the date of such offer and refusal.[5]

20. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808, per Beatty, C. J., dissenting.

1. Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85.

2. Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322 (evidence held sufficient to sustain the finding of the trial court, to the effect that the attempts of the plaintiff to effect a reconciliation were not made in good faith).

3. Andrews v. Runyon, 65 Cal. 629, 4 Pac. 669.

4. Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85.

5. Howard v. Howard, 134 Cal. 346, 66 Pac. 367, holding also that the record of a former judgment in an action for a divorce, brought by the husband on the ground of an alleged desertion by the wife, as of a date subsequent to the agreement for separation, and prior to the offer of reconciliation, in which action the husband was defeated, is irrelevant and immaterial to the issue of desertion alleged as of the subsequent date of the offer and refusal.

§ 43. When Solicitation must be Made.—The code requires that the return and offer to fulfill the marriage contract must be made "before the expiration of the statutory period required to make the desertion a cause of divorce."[6] While an offer to return made in good faith within that time will cure the desertion, an offer made afterwards comes too late, and need not be accepted by the injured party.[7] The rule has been well stated as follows: "The offer to return is ineffectual if made after the statutory period has elapsed. However willful the leaving may have been or however destitute of reasonable cause, it is not a ground of divorce unless the separation has continued for the statutory period. The door of repentance and return must be kept open during that period. But after the statutory time has elapsed the injured party has a cause for divorce. If such a party refuses to renew cohabitation it is not desertion. For to renew cohabitation is to condone the offense, and the law does not enforce condonation. This refusal of an offer to return will not bar the divorce to which the party is already entitled."[8] It has been said, however, that this rule does not take into consideration the contingency where the injured party's right of action is barred

6. Civ. Code, § 102.

7. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297; Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694; Benkert v. Benkert, 32 Cal. 467; Walker v. Walker, 14 Cal. App. 487, 112 Pac. 479; Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037. See Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906, holding that a wife who had left her husband by abandoning the family dwelling-house, and remained away for more than twenty-seven years, having lived in adultery under an assumed contract marriage with another man, with whom she lived until his death, had thereby forfeited all right to be recognized or received by the husband as his wife; and the failure of the husband thereafter to comply with a demand of the wife that he should receive and support her as his wife did not constitute desertion upon his part; and even if it was shown that he had originally deserted her, she would not, under such circumstances, have been entitled to receive any support from him. See note, 18 A. L. R. 630, as to offer after lapse of statutory period of desertion to resume marital relations.

8. Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037, quoting from Nelson on Divorce and Separation, par. 75.

by the statute of limitations. The rule seems to be that offer of reconciliation is too late if made after the statutory period for a divorce on that ground has elapsed, unless, prior to the offer, the long delay in seeking a divorce establishes the presumption of acquiescence with intent to continue the marriage relation.[9]

In this connection it should be observed that the rule, stated above, that an offer to return, made after expiration of the time necessary to give ground for divorce, will not, if refused, defeat the action of the injured party for divorce, has no application where the injured wife seeks, not a dissolution of the marriage bond, but separate maintenance. Such an action is defeated where the desertion by the husband is cured pendente lite, by a bona fide offer of the husband to provide a home for the wife at any reasonable place of her own choosing, and to return and live with her as husband and wife, although such offer is made more than one year after the desertion.[10]

§ 44. Effect of Failure to Assert Right to Divorce.— The character of the separation of a man and wife is not forever established by the status at the time they cease to live together. What was originally a separation without consent may become a separation by consent, and whether or not it has become such is a question of fact, depending for its solution upon all the circumstances of the particular case.[11] Desertion is a continuing offense, but it continues only so long as there is a want of consent to the separation on the part of the deserted party.[12] Of course, the original offense is not destroyed by the fact

9. Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037 (ten years' delay held sufficient to bar the wife's cause of action). And see infra, § 44.

10. McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554. And see Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906.

11. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

12. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808; Silva v. Silva, 32 Cal. App. 115, 162 Pac. 142.

that, after the desertion has continued for the period essential to make it a ground of divorce, the status of the separation changes and the separation becomes in every way agreeable to the deserted party. The latter still has a right of action for a divorce because thereof, and is not obliged to condone the offense.[13] But he is compelled to assert that right within a reasonaable time,[14] and the continuance of the separation after such change in the status is not a continuation of the desertion. The parties are by the change placed in the position of living separate and apart by consent, and under the provisions of section 101 of the Civil Code either party may revoke his consent and in good faith seek a reconciliation and restoration, and the refusal of the other to conform thereto constitutes desertion on his or her part, which, if continued for one year, becomes a ground of divorce. Of course, a complete answer to the complaint for divorce in such a case would be the showing by the other party of any cause of divorce against the plaintiff, but it must be a subsisting ground of divorce, one upon which she was then entitled to a divorce, and not one barred by statute.[15] The law, it is said, does not contemplate a continuance of the marital relation with the parties living separate and apart against the will of one of them. The conclusion is based upon the assumption that the law is humane and never closes the door of hope to one penitentially and in good faith offering reparation and seeking reconciliation and restoration.[16]

§ 45. Refusal of Wife to Conform to Husband's Residence.—It is a general rule that the husband, being the

13. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808; Benkert v. Benkert, 32 Cal. 467.

14. Civ. Code, § 124, subd. 3.

15. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808, Angellotti, J.; Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85; Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037.

16. McMullin v. McMullin, 140 Cal. 112, 75 Pac. 808; Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037.

head of the family, and bound for its support and maintenance, may choose the matrimonial domicile at pleasure, and it is the duty of the wife to submit to the reasonable exercise of this right.[17] The refusal of the wife to accompany the husband upon a change of his residence, followed by an actual cessation of matrimonial cohabitation, and unattended by any excusing or explanatory circumstances, constitutes sufficient evidence of desertion to authorize a divorce.[18] This rule is declared in section 103 of the Civil Code, which is as follows:

"The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion."[19]

As indicated by this code section the right of the husband to determine the family abode is not an entirely arbitrary one. He is bound to provide and establish a suitable home for his wife, a "reasonable place or mode of living," ere he can insist that she follow him,[20] and it is only when he has so chosen and established the new domicile, and, in good faith, has made offer of the new abode to her, and she, without a sufficient cause, has refused to comply with his selection, that a cause of action for desertion arises.[1] It is not enough that, prior to his establishing the new domicile, she informs him she will not follow him, for, perchance, he may accede to her wishes and not make

17. Hardenbergh v. Hardenbergh, 14 Cal. 654; Bibb v. Bibb, 39 Cal. App. 406, 179 Pac. 214.

18. Hardenbergh v. Hardenbergh, 14 Cal. 654.

19. Civ. Code, § 103,

20. Bibb v. Bibb, 39 Cal. App. 406, 179 Pac. 214.

1. Keesey v. Keesey, 160 Cal. 727, 117 Pac. 1054; Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694 (holding that a recriminatory plea by the husband, alleging desertion by the wife for not conforming to his choice of a reasonable place and mode of living, is not sustained where it appears that they had lived for years in a suitable home belonging to the wife, among her friends, and that his choice of a different home was not made in good faith, and that his offer of another suitable home elsewhere was not made until after her cause of action against him for a divorce became perfected); Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518.

the change; or she, perhaps, when the new domicile shall have been actually chosen and established, may change her mind. Nor is she in default until, having established a new domicile, he has offered it to her and requested her to follow him, for until such offer and request be made, and she thereby informed as to the location and character of the place chosen by the husband, she cannot know whether it is a "reasonable place of living."[2] Finally, if it be his intention to visit upon his wife the penalty of her failure to follow him to the new domicile, he should present to her, in plain and unequivocal terms, the alternative of a compliance with his wishes or a surrender of all her conjugal rights. Unless such alternative be so presented to her, it cannot readily be ascertained whether or not she harbors an actual intent to desert him.[3] When a husband seeks a divorce from his wife because of her refusal to follow him to a new abode, he must show affirmatively that the new domicile selected by him is a reasonably suitable place of abode,[4] especially where there is testimony of the wife as to the reason why she had no confidence in the plaintiff's offer.[5] Indeed,

"If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him."[6]

Where the wife has abandoned the husband without justification, it is her duty to return and conform to his reasonable place and mode of living as the head of the family.

2. Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694.

3. Hardenbergh v. Hardenbergh, 14 Cal. 654 (holding that the circumstances were sufficient to authorize the defendant to regard any proposition for her removal, as a proposal addressed merely to her discretion, and which she could reject without incurring the penalty or even suspicion of desertion); Bibb v. Bibb, 39 Cal. App. 406, 179 Pac. 214.

4. Bibb v. Bibb, 39 Cal. App. 406, 179 Pac. 214; Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037.

5. Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037.

6. Civ. Code, § 104.

It is not the duty of the husband so abandoned by the wife to solicit her return, and until her offer to return, no obligation of support rests upon him.[7]

§ 46. Separation Pending Suit.—Whether it constitutes desertion for one spouse to leave the other while an action for divorce is pending depends upon good faith. While, it is said, it would seem that there would be no desertion if the divorce action is brought in good faith, even though it develops that the suit was unfounded, it is clear that one who intends to desert cannot, with that intent, leave the family residence and live separate from the other, and at the same time destroy the effect of the desertion by immediately beginning an unfounded action for divorce. In the absence of good faith, the beginning of the action cannot transform a causeless abandonment of the marital domicile into an innocent absence or into a separation brought about through the other's fault. The burden of proof of showing good faith in bringing an unfounded action for divorce under such circumstances rests upon the party who brought it. And a finding that the action was unfounded, and that there was no cruelty, although not necessarily inconsistent with good faith, destroys any presumption to that effect, in the absence of an express finding on the issue of good faith. Similarly, it has been held, a subsequent action for maintenance, begun by the wife, could have no effect upon the running of the statutory period of one year necessary to make the wife's desertion a cause for divorce.[8]

§ 47. Effect of Insanity of Deserting Spouse.—It is recognized that inasmuch as an insane person is incapable of forming the requisite intent necessary to desertion, he cannot be guilty of desertion. So also if a deserting spouse be sane at the desertion but afterwards becomes

7. Kessler v. Kessler, 2 Cal. App. 509, 83 Pac. 257.

8. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297.

insane, the better view is that the time during which the insanity continues is not to be computed in determining the time of the desertion, as the desertion must continue willful or intentional for the full statutory period.[9] But it is evident that if the deserting spouse becomes insane after the statutory period has expired, the other's right to a divorce is not affected thereby.[10]

Willful Neglect.

§ 48. In General.—Willful neglect is a distinct ground of divorce, whether accompanied by desertion or otherwise.[11] It is defined by the Civil Code to be "the neglect of the husband to provide for his wife the common necessaries of life, he having the ability to do so; or . . . the failure to do so by reason of idleness, profligacy, or dissipation."[12] It must be willful,[13] and must continue one year before it is a ground for divorce.[14] And mere nonsupport does not justify a divorce where there is no proof that the wife ever made any demand therefor, or that the husband knew that she was in need of it.[15]

9. 9 Ruling Case Law, 357. See supra, § 43.

10. Harrigan v. Harrigan, 135 Cal. 397, 87 Am. St. Rep. 118, and note, 67 Pac. 506. See note, 4 A. L. R. 1333, as to insanity as affecting divorce for desertion, living apart or nonsupport.

11. Washburn v. Washburn, 9 Cal. 475, construing Divorce Act, § 4, and holding that in an application by the wife for a divorce on the ground of the willful neglect of her husband, for the period of three years, to provide for her the necessaries of life, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit.

12. Civ. Code, § 105; Locke v. Locke, 153 Cal. 56, 94 Pac. 244.

13. See note, 4 A. L. R. 1333, as to insanity as affecting divorce for desertion, living apart, or nonsupport.

14. Civ. Code, § 107; Locke v. Locke, 153 Cal. 56, 94 Pac. 244, Porter v. Porter, 35 Cal. App. Dec. 53, 198 Pac. 1006.

15. Travers v. Travers, 1 Lab. 177.

§ 49. Ability to Provide.—The law does not fix the amount of income which the husband must receive in order to impose upon him the obligation of supporting his wife, nor does it attempt to designate what are the common necessaries of life. These matters vary with the diverse circumstances of the parties to the marriage, and it is left to the discretion of the judge in each case to determine whether the husband's income, as well as the relation between him and his wife, are such as to impose upon him the obligation of providing for her wants; but when a husband is in constant employment for which he receives the ordinary wages of his labor, and refuses or neglects for years to make any provision for the wants of his wife, a court is justified in finding him guilty of willful neglect.[16] The ability mentioned in the statute has reference to the possession by the husband of the means in property to provide such necessaries, not to his capacity of acquiring such means by labor. A wife is not entitled to a divorce if the husband is without funds and cannot get work, and for that reason fails to support her.[17] It must appear affirmatively on the part of the applicant that the husband was the owner of property sufficient to provide the necessaries of life, and neglected to do so.[18]

§ 50. Where Wife has Separate Property.—In harmony with the principle that the neglect must be "willful" on the part of the husband,[19] it has been held that the failure

16. Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935.

17. Berry v. Berry, 145 Cal. 784, 79 Pac. 531.

18. Washburn v. Washburn, 9 Cal. 475, Field, J. And see Berry v. Berry, 145 Cal. 784, 79 Pac. 531; Porter v. Porter, 35 Cal. App. Dec. 53, 198 Pac. 1006 (holding that where the husband enlisted in the army and arranged for an allotment to his wife out of his army pay, and there was no evidence that he was able to pay anything more, the evidence was insufficient to prove willful neglect). Compare Thomas v. Thomas, 1 Lab. 243, holding that where the proof of ability was that the husband was an able-bodied man, in good health, and able to earn the means of supporting his family, the wife was entitled to a divorce though he had no property out of which the means of support might be realized or any fund on hand.

19. See supra, § 49.

of the husband, having the ability so to do, to provide his wife with the common necessaries of life does not entitle her to a divorce, if the wife is wealthy in her own right, or is in the receipt of sufficient income from her own property to provide herself and her children with such necessaries, while the earning capacity of the husband is not great, and she has not asked him for assistance during the period of their separation.[20] The natural inference to be drawn from such facts supports the conclusion that plaintiff does not expect the defendant to contribute to her support during their separation.[1] During the time that her property thus yields her an ample return she has no cause of action for nonsupport.[2] The court's power to refuse a divorce in such case is somewhat analogous to the authority to relieve a party to an action for divorce from the payment of alimony where it is not necessary because of her wealth, for the divorced wife's maintenance. The propriety of such relief, upon proper showing, has been declared.[3]

§ 51. Where the Earnings of Wife are Sufficient for Support.—It is said that the neglect must be such as leaves the wife destitute of the common necessaries of life,

20. Baker v. Baker, 168 Cal. 346, Ann. Cas. 1916A, 854, 143 Pac. 607; Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868; Travers v. Travers, 1 Lab. 177. See Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402, holding that where the plaintiff charged the defendant with willfully failing to provide, on cross-examination of the plaintiff the court properly permitted the introduction in evidence of a letter written by her to the defendant containing a request for money and which, in substance and tenor, tended to show the actual relations between the parties as regards money matters.

1. Baker v. Baker, 168 Cal. 346, Ann. Cas. 1916A, 854, 143 Pac. 607; Johnson v. Johnson, 17 Cal. App. 241, 119 Pac. 403 (where the evidence showed that when the wife left the husband he provided her with transportation, and that while absent from him, she neither asked nor desired the defendant to contribute to her support).

2. Baker v. Baker, 168 Cal. 346, Ann. Cas. 1916A, 854, 143 Pac. 607.

3. Baker v. Baker, 168 Cal. 346, Ann. Cas. 1916A, 854, 143 Pac. 607, citing Soule v. Soule, 4 Cal. App. 97, 87 Pac. 205. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 968.

or such as would leave her destitute but for the charity of others. If those common necessaries are provided by the earnings of either husband or wife there is no such willful neglect as is contemplated by the statute. The earnings of both go into a common fund, and become common property, the control and disposition of which belong to the husband, and when applied by him, or with his assent, for her support, and are sufficient for that purpose, there is no basis for a decree, and the application must fail, although the husband lives in idleness.[4] This rule is extremely harsh, and has been condemned, in unsparing terms,[5] and it would seem that it should not be applicable when the wife is living apart from her husband, for then her earnings, as well as those of her minor children in her custody, are her separate property.[6] It may be added that the earlier cases,[7] which originally announced the rule, were decided before the adoption of the statute providing that a wife's earnings in such case are separate property, nor is the rule applicable where, for more than a year prior to the action, the wife could not and did not support herself.[8]

IV. CAUSES FOR DENYING DIVORCE.

§ 52. Enumeration of Causes—Insanity as a Defense.—Section 111 of the Civil Code provides that divorces must be denied upon showing: (1) connivance;[9] (2) collusion;[10]

4. Rycraft v. Rycraft, 42 Cal. 444; Washburn v. Washburn, 9 Cal. 475; Hansen v. Hansen, 27 Cal. App. 401, 150 Pac. 70. See Locke v. Locke, 153 Cal. 56, 94 Pac. 244, in which the court in the main opinion refers to but does not decide whether this is the rule.

5. Per James, J., concurring in Hansen v. Hansen, 27 Cal. App. 401, 150 Pac. 70.

6. Civ. Code, § 169. See COMMUNITY PROPERTY, vol. 5, p. 304. See note, 10 A. L. R. 778, as to right of wife not living with husband to her own earnings.

7. Rycraft v. Rycraft, 42 Cal. 444; Washburn v. Washburn, 9 Cal. 475.

8. Locke v. Locke, 153 Cal. 56, 94 Pac. 244.

9. See infra, § 53.

10. See infra, § 54.

(3) condonation;[11] (4) recrimination;[12] or (5) limitation and lapse of time.[13] In addition to these causes it seems that insanity of a spouse incapacitating him from committing the acts charged is a sufficient cause for denying a divorce.[14] As an insane person cannot entertain the intent requisite to a desertion, an insane person cannot be guilty of desertion.[15] But insanity occurring subsequent to the accrual of the right to a divorce is no defense.[16]

§ 53. Connivance.—Connivance is defined as the "corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce."[17] The "corrupt consent" here referred to "is manifested by passive permission, with intent to connive at or actively procure the commission of the acts complained of."[18] Hence where the plaintiff consents to the commission of the act complained of, or actively plans to bring it about, a divorce will be denied.[19] Whether such connivance exists is a question for the trial court, and where the evidence, at most, shows only facts from which a possible inference might be drawn that the plaintiff planned to bring about the conduct complained of, but not such as to require such inference to be drawn, the determination of the trial court to the contrary will not be disturbed upon appeal.[20]

11. See infra, § 55.

12. See infra, § 58.

13. See infra, § 60. See note, 9 A. L. R. 1076, as to construction and effect of statute providing against more than one divorce.

14. Cohn v. Cohn, 85 Cal. 108, 24 Pac. 659, where it was claimed the defendant was guilty of extreme cruelty.

15. See supra, § 47.

16. Harrigan v. Harrigan, 135 Cal. 397, 87 Am. St. Rep. 118, 67 Pac. 506. See note, 4 A. L. R. 1333, as to insanity as affecting divorce for desertion, living apart or nonsupport.

17. Civ. Code, § 112. Thomson v. Thomson, 121 Cal. 11, 53 Pac. 403. See supra, § 41, as to separation by consent as constituting desertion.

18. Civ. Code, § 113.

19. Borden v. Borden, 166 Cal. 469, 137 Pac. 27.

20. Meyer v. Meyer, 184 Cal. 687, 195 Pac. 387.

§ 54. Collusion.—Collusion is defined as "an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce."[1] An agreement not to contest a divorce action is not collusion within this definition, but it is none the less a fraud upon the court.[2] Whenever, in an action for divorce, it appears that the parties are in collusion, the divorce must be denied.[3] And even if the decree has been entered, if the court has not lost jurisdiction, it should be set aside on suggestion, and may be set aside by the court of its own motion.[4] But where a collusive decree has become final, courts of equity will not ordinarily interfere at the instance of either party.[5]

§ 55. Condonation Generally.—The doctrine of condonation had its origin in England in the ecclesiastical courts, and has been generally adopted in this country, although the ecclesiastical law itself is not recognized as part of the common law.[6] Condonation is a defense to an action for

1. Civ. Code, § 114; Thomson v. Thomson, 121 Cal. 11, 53 Pac. 403. See note, 2 A. L. R. 699, as to collusion as bar to divorce; and note, 16 A. L. R. 427, as to validity and effect of divorce as affected by representation of both parties by the same attorney.

2. Beard v. Beard, 65 Cal. 354, 4 Pac. 229.

3. Civ. Code, § 111, subd. 2; Borden v. Borden, 166 Cal. 469, 137 Pac. 27; Keesey v. Keesey, 160 Cal. 727, 117 Pac. 1054; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 63, 74 Pac. 28; Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954. See Gould v. Gould, 63 Cal. Dec. 425, 205 Pac. 1072, holding an action for divorce cannot proceed at the instance of a cross-complainant, after a request of the plaintiff for a dismissal because of his inability to prove residence, where it appears that the defendant's denials of the charges and allegation that his acts were done under a collusive agreement, were true only in form and not in effect.

4. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020; Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954.

5. Bancroft v. Bancroft, 178 Cal. 359, 173 Pac. 579; Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954. See infra, § 102, as to relief from a collusive decree of divorce.

6. 9 Ruling Case Law, 379.

divorce.[7] Even when the parties thereto admit a condonation, pending the action, and ask that the action be dismissed, the court should at once order the case dismissed and make no further order in it.[8]

As defined by the code, "Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce."[9]

"The following requirements are necessary to condonation: 1. A knowledge on the part of the condoner of the facts constituting the cause of divorce;[10] 2. Reconciliation and remission of the offense by the injured party; 3. Restoration of the offending party to all marital rights."[11]

It has been ruled in other jurisdictions that one act of sexual intercourse is conclusive evidence of condonation in case of adultery,[12] although it is not where the alleged offense is extreme cruelty or desertion.[13] Under the section above quoted, however, one of the requirements necessary to condonation is "restoration of the offending party to all marital rights," and this requirement is not proved by evidence of sexual intercourse alone.[14] So also a voluntary promise by the wife, after separation from her husband on account of his extreme cruelty, to return to, and live with, him, does not alone constitute condonation, if such promise is not kept, since it has neither the effect to remit his offenses nor to restore him to marital rights.[15] Not only will ignorance of the condoner of the facts con-

7. Civ. Code, § 111, subd. 3.

8. Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480.

9. Civ. Code, § 115; Millar v. Millar, 175 Cal. 797, L. R. A. 1918B, 415, 167 Pac. 394; Benkert v. Benkert, 32 Cal. 467.

10. Andros v. Andros, 1 Cal. App. 309, 82 Pac. 90, holding the facts proved did not show a condonation, the condoner being ignorant of the facts.

11. Civ. Code, § 116. See note, 6 A. L. R. 1157, as to condonation of matrimonial offense without cohabitation.

12. Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590, citing Anonymous, 6 Mass. 147.

13. Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590, citing Gardner v. Gardner, 2 Gray (Mass.), 434; Kennedy v. Kennedy, 87 Ill. 250.

14. Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590.

15. Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037.

stituting the cause of divorce, avoid a condonation,[16] but

"A fraudulent concealment by the condonee of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, avoids such condonation."[17]

§ 56. Condonation of Offensive Conduct or Cruelty.— It is provided in the Civil Code that

"Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from excessive acts of ill treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone."[18]

"In cases mentioned in the last section, condonation can be made only after the cause of divorce has become complete, as to the acts complained of."[19]

Under these provisions a condonation is not made out unless the evidence discloses an express agreement to condone the offense.[20] Evidence showing merely conjugal kindness is insufficient.[1] Also the fact that a wife continued to live with her husband for some time, after the acts of cruelty, and until the summons was served, does

16. Civ. Code, § 1116, subd. 1.

17. Civ. Code, § 120.

18. Civ. Code, § 118. See note, 14 A. L. R. 931, as to condonation of cruel treatment as defense in divorce action.

19. Civ. Code, § 119.

20. Hunter v. Hunter, 132 Cal. 473, 64 Pac. 772; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183 (holding that alleged newly discovered evidence of a letter from the plaintiff to defendant, claimed to be evidence of condonation, a copy of which was proved at the trial to be in the possession of plaintiff, and of which defendant might then have requested the production, and, if not produced, might have applied for postponement of the trial for a reasonable time to enable him to find the original, is not ground for a new trial, especially where it appears that the letter, at most, was only evidence of conjugal kindness, and did not tend to show an express agreement to condone the offensive course of conduct of the defendant); Morton v. Morton, 117 Cal. 443, 49 Pac. 557; Whinnery v. Whinnery, 21 Cal. App. 59, 130 Pac. 1065; Johnson v. Johnson, 4 Cal. Unrep. 446, 35 Pac. 637.

1. Hunter v. Hunter, 132 Cal. 473, 64 Pac. 772.

not amount to condonation, unless accompanied by a reconciliation between the parties, a remission of the matrimonial offenses and an express agreement to condone.[2]

§ 57. Revocation of Condonation.—"Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness."[3]

"Condonation is revoked and the original cause of divorce revived: 1. When the condonee commits acts constituting a like or other cause of divorce; or, 2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled."[4]

Thus, while a wife may have condoned numerous offenses of her husband by resuming marital relations with him, nevertheless the condonation is revoked as to all previous actions when the husband deserts the wife, without cause, thus giving her another cause of divorce.[5] And it has been held that the return of the wife to the husband after a course of cruel treatment, which caused her to leave him, does not establish a condonation, where it appears that the husband thereafter renewed his cruel treatment, and was repeatedly guilty of the same offenses which he had formerly committed.[6] By such harsh treatment, the condoned acts of cruelty are revived.[7] And

2. Morton v. Morton, 117 Cal. 443, 49 Pac. 557.

3. Civ. Code, § 117; Neeley v. Neeley, 179 Cal. 232, 176 Pac. 163; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 840; Brewthauer v. Brewthauer, 45 Cal. App. 759, 188 Pac. 296; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Johnson v. Johnson, 4 Cal. Unrep. 446, 35 Pac. 637 (citing 2 Bishop on Marriage and Divorce, § 308).

4. Civ. Code, § 121; Neeley v. Neeley, 179 Cal. 232, 176 Pac. 163; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 840; Brewthauer v. Brewthauer, 45 Cal. App. 759, 188 Pac. 296; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402.

5. Bennett v. Bennett, 32 Cal. App. Dec. 948, 192 Pac. 180.

6. Andrews v. Andrews, 120 Cal. 184, 52 Pac. 840.

7. Andrews v. Andrews, 120 Cal. 184, 52 Pac. 840; Gaskins v. Gaskins, 1 Lab. 381; Pursley v. Pursley, 1 Lab. 52.

this is true even if the subsequent conduct of the offender would not of itself justify a separation; still the after acts to revive the first cause of complaint should be of no trivial or slight consequence, but such as would reasonably justify the apprehension of a renewal of bad treatment.[8]

§ 58. Recrimination, Generally.—It is a general principle of the common law that whoever seeks redress for the violation of a contract resting upon mutual and dependent covenants, to obtain success, must himself have performed the obligations on his part.[9] Something analogous to this principle is found in the doctrine of recrimination or compensatio criminum, which was originally borrowed from the canon law, by which the defendant is permitted to contest the plaintiff's application for divorce on the ground of plaintiff's own violation of the marriage contract—to set off, to use the language of the cases, the equal guilt of the plaintiff.[10] The doctrine of recrimination by the defendant as a defense in bar of the plaintiff's relief has become fully established in this country,[11] including the state of California.[12] It is provided that

"Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce."[13]

8. Pursley v. Pursley, 1 Lab. 52.

9. See CONTRACTS, vol. 6, p. 396 et seq.

10. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717, per Field, J. "The doctrine," observes Lord Stowell, "that this, if proved, is a valid plea in bar, has its foundation in reason and propriety; it would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to the charge of the same nature. It is not unfit, if he who is the guardian of the purity of his own house has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he, who has violated his marriage vow, should be barred of his remedy, the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt." Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717, citing Beeby v. Beeby, 1 Hagg. Ecc. 790.

11. 9 Ruling Case Law, 387.

12. Civ. Code, § 111, subd. 4.

13. Civ. Code, § 122; Smith v. Smith, 119 Cal. 183, 48 Pac 730, 51 Pac. 183; Cassidy v. Cassidy, 63

Under this section, in order to defeat the plaintiff's cause of action, the recriminatory answer of a defendant must allege facts which, if proved, would authorize or justify a decree of divorce in his favor if he had sued therefor;[14] but it may allege an unlike cause of divorce.[15] In this connection it may be stated, however, that while sometimes the complaining party may not be guilty of such conduct as constitutes a cause for divorce, and, therefore, not available to the defending party in recrimination, yet it may be such as to justify the court in denying a divorce if such conduct was of a kind calculated to cause the conduct of the defending party, for which the divorce is sought.[16]

Effect of condonation of recriminating defense.—Section 123 of the Civil Code provides as follows:

"Condonation of a cause of divorce, shown in the answer as a recriminatory defense, is a bar to such defense, unless the condonation be revoked, as provided in section one hundred and twenty-one, or two years have elapsed after the condonation, and before the accruing or completion of the cause of divorce against which the recrimination is shown."

§ 59. Character of Charges.—While it was the rule of the ecclesiastical courts that a recriminatory plea must be for the same kind of offense as that charged in the plaintiff's pleading, the settled course of parliament, in determining on the propriety of granting a petition of divorce a vinculo matrimonii, was to allow a different offense from that complained of to be pleaded in recrimination. The latter rule prevails in California, the Civil Code specifically providing that "any cause of divorce against

Cal. 352; Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85.

14. Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Cassidy v. Cassidy, 63 Cal. 352; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

15. See infra, § 59.

16. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546. See supra, § 35.

the plaintiff" may be shown by way of recrimination,[17] and this was the rule adopted before the enactment of the codes.[18] Thus in a suit by one spouse for a divorce on the ground of adultery, the other spouse may set up in recrimination a charge of desertion by the plaintiff, if it continued for the statutory period necessary to constitute a cause for a divorce.[19] So also extreme cruelty on the part of the plaintiff may be pleaded when the offense complained of is adultery,[20] desertion,[1] or extreme cruelty.[2]

§ 60. Limitation and Lapse of Time.—The Civil Code provides that

"A divorce must be denied: One. When the cause is adultery and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party;[3] or, two. When the cause is conviction of felony, and the action is not commenced before the expiration of two years after a pardon, or the termination of the period of sentence.[4] Three. In all other cases when there is an unreasonable lapse of time before the commencement of the action."[5]

"Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent

17. Civ. Code, § 122.

18. The early English cases in which the doctrine of recrimination has been generally applied have been those in which the adultery of the plaintiff was established, but as the California statute attaches to other offenses the same consequences as to adultery, there is reason and propriety in extending to them the same principle. It is eminently fit that he who seeks a divorce should himself be guiltless of conduct which would entitle the other party to similar relief. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717, per Field, J.

19. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

20. White v. White, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276.

1. Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85.

2. Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Cassidy v. Cassidy, 63 Cal. 352.

3. See supra, § 16.

4. See supra, § 15.

5. Civ. Code, § 124; Neeley v. Neeley, 179 Cal. 232, 176 Pac. 163; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Johnson v. Johnson, 21 Cal. App. 181, 131 Pac. 81.

to continue the marriage relation notwithstanding the commission of such offense."[6]

"The presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action."[7]

"There are no limitations of time for commencing actions for divorce, except such as are contained in section one hundred and twenty-four."[8]

The question whether the lapse of time is reasonable or not is one which the trial court must determine.[9] It has been held, however, that a presumption of condonation of the offense or acquiescence therein where there is an unexplained delay in bringing the action of six,[10] seven,[11] ten,[12] or eighteen[13] years after the occurrence of the act complained of. But where a suit for divorce on the ground of extreme cruelty was dismissed upon an agreement that the husband would refrain from acts of unkindness, but nearly four years thereafter he repeated them, the original cause of action was thereby revived, and plaintiff was not guilty of unreasonable delay in bringing a second suit which was commenced one day after the last act of cruelty.[14] Sections 124 and 125 of the Civil Code do not have the effect, however, of requiring a wife to commence an action for divorce for nonsupport within any particular time, and refrain from supporting herself or forfeit her right thereto. And the mere fact that she supported herself while able to do so will not preclude a suit for divorce for nonsupport continuing one year after her

6. Civ. Code, § 125; Neeley v. Neeley, 179 Cal. 232, 176 Pac. 163; Johnston v. Johnston, 21 Cal. App. 181, 131 Pac. 81.

7. Civ. Code, § 126; Thompson v. Thompson, 121 Cal. 11, 53 Pac. 403, holding the presumptions to have been rebutted.

8. Civ. Code, § 127.

9. Johnston v. Johnston, 21 Cal. App. 181, 131 Pac. 81.

10. Johnston v. Johnston, 21 Cal. App. 181, 131 Pac. 81.

11. Hale v. Hale, 60 Cal. Dec. 551.

12. Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037.

13. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

14. Neeley v. Neeley, 179 Cal. 232, 176 Pac. 163.

inability to support herself. And under the rule that she has no right of action while her earnings are sufficient to provide for her, her cause of action does not accrue until her earnings cease.[15]

V. JURISDICTION AND VENUE.

§ 61. Courts having Jurisdiction. — In England the ecclesiastical courts exercised jurisdiction in all suits for divorce down to the year 1857. Courts of equity were generally held to have no inherent jurisdiction in the matter, and, on the theory that ample relief was obtainable in courts ecclesiastical, they did not entertain jurisdiction even for the purpose of decreeing the annulment of marriages. In this country the ecclesiastical law of England was not adopted as a part of our common law, though in certain other particulars there is some conflict on the question as to how far the ecclesiastical law enters into our system of jurisprudence. In cases of divorce, as distinguished from annulment, the grounds therefor are dependent solely upon statute, and, likewise, the jurisdiction of the courts in this country to grant divorces is dependent upon statutory or constitutional provisions. It follows that such power is not inherent in any of our courts as successors to the jurisdiction of the ecclesiastical courts of England.[16] Full original jurisdiction in this respect has been conferred by the constitution upon the superior courts, however.[17] This grant does not, however, deprive the legislature of power to make reasonable regulations as to the proceedings by which the jurisdiction in such cases is exercised, and to prescribe the terms and conditions on which a di-

15. Locke v. Locke, 153 Cal. 56, 94 Pac. 244. See supra, § 51.

16. 9 Ruling Case Law, 395. Compare Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709. And see supra, §§ 4, 5.

17. Const., art. VI, § 5. Estate of McNeil, 155 Cal. 333, 100 Pac. 1086; Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891. And see Code Civ. Proc., § 76, subd. 4, to the same effect.

vorce may be granted.[18] It is well established that the federal courts have no jurisdiction upon the subject of divorce; but they have the power to relieve against judgments of state courts, including judgments of divorce, obtained by imposition and fraud.[19]

The superior court at once acquires jurisdiction of the subject matter of the action when a complaint is filed asking for a divorce, regardless of whether or not the complaint states facts warranting the granting of a divorce. And when it has obtained jurisdiction of the person of the defendant, it has the power to hear and determine the cause. In so hearing and determining it is proceeding in the exercise of its lawful jurisdiction, which involves the power to determine the sufficiency of the facts alleged as a ground for divorce.[20] If it errs in its conclusion in this matter it is simply error in the exercise of the jurisdiction, which can be corrected only in the way provided by law for a review of the action of the trial court, and which cannot be reached on collateral attack or even reviewed in any other action.[1] In this connection it has been held that section 128 of the Civil Code, relative to residence of the plaintiff, does not impose any limitation on the juris-

18. Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891. See supra, § 4.

19. McNeil v. McNeil, 78 Fed. 834. See Sharon v. Sharon, 84 Cal. 424, 23 Pac. 1102, holding that where a federal court, having prior jurisdiction, has rendered judgment canceling a forged instrument, claimed by the defendant to be a subsisting contract of marriage with plaintiff, and enjoining the use of such instrument, or the claiming of any rights or interest in property thereunder, its judgment will prevail over the judgment of the superior court of California declaring that a contract of marriage subsisted between the parties by virtue of said instrument only, and granting a divorce and alimony, counsel fees, and costs, in an action for a divorce subsequently commenced in such superior court by the defendant in the circuit court against the plaintiff therein, though the judgment of the superior court was first rendered and was affirmed upon appeal. See infra, §§ 700–702. As to equitable relief against judgments generally, see JUDGMENT.

20. Estate of McNeil, 155 Cal. 333, 100 Pac. 1086.

1. Estate of McNeil, 155 Cal. 333, 100 Pac. 1086; Estate of James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122. As to collateral attack, see infra, § 103.

diction of the superior court in the matter of divorces, but simply prescribes certain facts as essential to the making out of a case warranting a divorce, and allegations in regard to residence stand upon the same footing as any other allegation of facts showing the right to a divorce. If they are defective in any respect and the court nevertheless holds them to be sufficient, there is nothing more than error in the exercise of jurisdiction.[2]

§ 62. Residence Generally.—Section 128 of the Civil Code, as amended in 1891, provides, in part, that

"A divorce must not be granted unless the plaintiff has been a resident of the state one year, and of the county in which the action is brought three months, next preceding the commencement of the action."

Prior to the passage of this amendment reproach had been brought upon the administration of the divorce laws by the frequency of proceedings commenced by complainants in counties where neither of the parties resided, the purpose being generally to avoid notoriety in the community where the plaintiff was known, and in some instances to obtain a decree by collusion, or to vex the defendant, or make it impossible or inconvenient for him or her to present a defense. It was the purpose of the amendment to correct this abuse.[3] The required residence is a jurisdictional fact and must appear to warrant a divorce.[4] And if it appears that the plaintiff cannot furnish the essential proof of residence, and there is no suggestion that the action might proceed on the cross-complaint of the defendant, the court may properly dismiss

2. Estate of McNeil, 155 Cal. 333, 100 Pac. 1086; Dahne v. Superior Court, 31 Cal. App. 664, 161 Pac. 280.

3. Warner v. Warner, 100 Cal. 11, 34 Pac. 523; Bennett v. Bennett, 28 Cal. 599; Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776.

4. Gould v. Gould, 63 Cal. Dec. 425, 205 Pac. 1072; Flynn v. Flynn, 171 Cal. 746, 749, 154 Pac. 837; Dahne v. Superior Court, 31 Cal. App. 664, 161 Pac. 280; Dillon v. Dillon, 45 Cal. App. 191, 187 Pac. 27; Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362. As to pleading residence, see infra, § 70.

the case on consent of the parties.[5] The residence must be an actual[6] bona fide one.[7] The mere fact that one is domiciled in the state is insufficient if he actually resides elsewhere. Indeed, it has been said that domicile is not the test of jurisdiction.[8] The question of residence is to be determined by the facts of each particular case, and much depends upon the intention.[9] It has been held that the fact that, at the time the plaintiff claims to have established a residence in the state, he was on military duty in an army camp did not preclude him from establishing his residence here if he so desired.[10]

Residence of cross-complainant.—Section 128 of the Civil Code, above quoted in part, was amended in 1911 so as to provide that "a cross-complainant in an action for divorce need not be or have been a resident of the state or of the county in which the action is brought or pending in order to entitle such cross-complainant to a divorce in said action . . . ." Yet, under the amendment the section is not broad enough to entitle such complainant to affirmative relief unless proof is offered that the plaintiff has resided in the jurisdiction for the requisite period. Without proof at the trial that one of the parties to the action had resided in the state and county for the necessary period, the court can never acquire jurisdiction to grant a divorce to one or other of the parties.[11]

§ 63. Domicile of Wife for Purposes of Divorce.—As a general rule, the domicile of a married woman follows that

5. Gould v. Gould, 63 Cal. Dec. 425, 205 Pac. 1072.

6. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 160, 32 L. R. A. 82, 44 Pac. 345. See DOMICILE.

7. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; Bennett v. Bennett, 28 Cal. 599; Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779.

8. De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

9. De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

10. Percy v. Percy, 63 Cal. Dec. 596, 207 Pac. 369.

11. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837.

of her husband, because, being under his authority, she has no right to choose one for herself.[12] But for the purposes of maintaining an action for a divorce, a wife may acquire a domicile by her own act.[13] This principle is recognized and stated in the code as follows:

"In actions for divorce the presumption of law, that the domicile of the husband is the domicile of the wife, does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions."[14]

Hence where the husband deserts the wife she may acquire a domicile apart from his.[15] The broad provision of the statute above quoted is not limited to cases where the wife is the plaintiff suing for the divorce. The reason of the rule applies to her whether she be the plaintiff or the defendant; her interests and rights as defendant are frequently more serious than any she could have as plain-

12. McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103; Estate of Wickes, 128 Cal. 270, 49 L. R. A. 138, 60 Pac. 867; Kashaw v. Kashaw, 3 Cal. 312; Horne v. Horne, 1 Lab. 313 (holding that where a wife leaves her husband and emigrates from another state to this state, without first acquiring a domicile or residence independent of her husband's in the state whence she removes, by the law of this state her residence remains unchanged and follows that of her husband); Wilkinson v. Wilkinson, 1 Lab. 162. See DOMICILE.

13. McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103; Estate of Wickes, 128 Cal. 270, 49 L. R. A. 138, 60 Pac. 867; Moffatt v. Moffatt, 5 Cal. 280.

14. Civ. Code, § 129; McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103. See Estate of Wickes, 128 Cal. 270, 49 L. R. A. 138, 60 Pac. 867 (stating that in the United States, the cases are at variance as to whether, for the purpose of maintaining an action for a divorce, a wife can acquire a domicile by her own act. In the majority of the states the rule is as declared by our own statute). See Kashaw v. Kashaw, 3 Cal. 312, decided before the adoption of section 129 of the Civil Code and holding that a wife who has been deserted by her husband may still treat her husband's domicile as her own, and may sue for divorce in the state of his domicile though she has not resided in such state. And see Travers v. Travers, 1 Lab. 177, holding, however, that the wife cannot claim her husband's residence here as her own, if it appears that she has selected another for herself.

15. Moffatt v. Moffatt, 5 Cal. 280; Travers v. Travers, 1 Lab. 177.

tiff. Accordingly it has been ruled that when the husband begins a suit for divorce, the domicile of the wife ceases to be the domicile of the husband, and she may acquire a separate actual domicile by change of residence from one country to another, pending the suit.[16]

§ 64. Place of Trial.—Section 128 of the Civil Code, heretofore quoted, requires that an action for divorce must be brought in the county of the residence of the plaintiff.[17] But this section must be read in connection with sections 395 and 397 of the Code of Civil Procedure, providing for the place of trial of personal actions generally. The former is a limitation as to the place for the commencement of actions of divorce; the latter provides for the place of trial. Hence there is no inconsistency in the different provisions and it has been held that a defendant in such an action has the right to a change of place of trial to the county in which he resides upon proper demand therefor.[18] Even though the plaintiff may ask for a division of the community and for the cancellation of a fraudulent deed of property by the husband to a third person, made a codefendant, the action does not become so far local that it must be tried in the county where the land is situated. And the defend-

16. McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103.

17. Warner v. Warner, 100 Cal. 11, 34 Pac. 523; Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776. See supra, § 62.

18. Warner v. Warner, 100 Cal. 11, 34 Pac. 523; Usher v. Usher, 4 Cal. Unrep. 521, 36 Pac. 8 (holding defendant's motion should be granted where the plaintiff's affidavit creates no substantial conflict with the defendant's, as to his residence).

These cases are cited and explained in Cochrane v. McDonald, 4 Cof. Prob. Dec. 533, 539, where attention is called to their being divorce cases, wherefore, notwithstanding the amendment of March 10, 1891, of section 128 of the Civil Code, requiring such actions to be brought in the county of which the plaintiff had been a resident for three months next preceding the institution of the suit, the defendant could, of right, under section 395 of the Code of Civil Procedure, have the place of trial changed to the county of his residence. As to change of venue in general, see VENUE.

ants have a right to have the action tried in the county of their residence.[19] But when the husband and wife are residents of the county where the action is brought, the alleged fraudulent grantee has no right to have a change of venue to the county where he resides and where the land is situated.[20] Of course, a denial of the motion upon conflicting affidavits as to defendant's residence is conclusive upon appeal.[1]

VI. PARTIES, PROCESS AND ABATEMENT.

§ 65. Parties.—It is the rule that a decree of divorce can be procured only at the suit of a party to the marriage.[2] The wife may sue or be sued alone,[3] but an infant, or an incompetent person, must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending.[4] Whether or not an action may be maintained in California on behalf of an insane person by his or her guardian, it has been held that where the courts of a foreign country have construed a statute thereof as authorizing the guardian of an incompetent to maintain the suit, such construction cannot be assailed to defeat a judgment of divorce granted thereunder.[5]

19. Warner v. Warner, 100 Cal. 11, 34 Pac. 523.

20. Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776.

1. Smilie v. Smilie, 24 Cal. App. 420, 141 Pac. 829; Nicholson v. Nicholson, 16 Cal. App. 754, 117 Pac. 1038; Bernou v. Bernou, 15 Cal. App. 341, 114 Pac. 1000. See APPEAL AND ERROR, vol, 2, p. 931.

2. Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442; Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776; 9 Ruling Case Law, 405. See PARTIES, as to parties to actions generally.

3. Code Civ. Proc., § 370, subd. 2.

4. Code Civ. Proc., § 372; Dunphy v. Dunphy, 161 Cal. 380, Ann. Cas. 1913B, 1230, 38 L. R. A. (N. S.) 818, 119 Pac. 512. See INFANTS; MARRIAGE. See note, 17 A. L. R. 900, as to necessity of appointment of guardian ad litem for a minor who is a party in an action for divorce, or annulment of marriage.

5. McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103. See infra, §§ 152–159, as to general effect of foreign divorces. See CONFLICT OF LAWS,

Parties defendants.—It has been said that the only proper parties to a divorce action are, generally, the husband and wife.[6] This statement is fundamental but in some instances a third party may also be a proper party. For example, where it is charged that the husband has conveyed the community property,[7] or even his separate property,[8] with intent to defraud the wife of her rights therein, the grantee in such fraudulent conveyance may be made a party, so that the property may be kept in statu quo pending the action and the conveyance may be set aside.

§ 66. Process in General.—As in other cases, due service of process or appearance is necessary to jurisdiction. Since the action is in the nature of a proceeding in rem in so far as it affects the status of the parties,[9] a service of summons by publication on a nonresident defendant is sufficient.[10] But in such case the jurisdiction of the court is limited to the termination of the marriage status.[11] In order to render a personal judgment binding upon a nonresident defendant the court must obtain jurisdiction of his person,[12] or over property of the defendant within the state.[13] The mere fact that the defendant may be domi-

vol. 5, p. 429, as to construction of foreign laws generally.

6. Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442, McFarland, J., concurring; Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 772.

As to right of a corespondent to appear, plead and be heard, see infra, § 76.

7. Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442; Kashaw v. Kashaw, 3 Cal. 312.

8. Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 772.

9. See supra, § 5.

10. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; In re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 167 Pac. 887.

11. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

12. Matter of McMullin, 164 Cal. 504, 129 Pac. 773; De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Shillock v. Shillock, 24 Cal. App. 191, 140 Pac. 954.

13. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac.

ciled in California does not give the court power to render a personal judgment against him upon publication of summons had in his absence from the state.[14] With respect to minor children within the jurisdiction the court may acquire jurisdiction to award their custody by a service of summons by publication only.[15] But it has no authority to award the custody of children not within the jurisdiction.[16]

§ 67. Affidavits in Case of Service by Publication.—It is essential to the validity of a divorce that the affidavit for service by publication comply with every material requirement of the statute relative to such service.[17] Thus, it has been held that an affidavit, purporting to rest on that part of the statute which refers to a person who "has departed from the state," is fatally defective if it uses the word "left" instead of "departed," the two words not being synonymous,[18] and such an affidavit is not aided by a further allegation that the destination is unknown, where such allegation is false and fraudulent.[19] To prove service by publication of summons the code requires affidavits showing such service.[20] It is, however, the fact of service which gives the court jurisdiction and not the proof of service, and the court has authority to receive amended affidavits showing a proper service of summons

345, citing Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. Ed. 931, see, also, Rose's U. S. Notes.

14. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

15. Matter of McMullin, 164 Cal. 504, 129 Pac. 773; In re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887. See supra, § 5.

16. See supra, § 5.

17. Estate of Hancock, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58; Estate of McNeil, 155 Cal. 333, 100 Pac. 1086. See PROCESS, as to service by publication in general.

18. The word "depart" has reference to permanent visits. Pezzoni v. Pezzoni, 38 Cal. App. 209, 175 Pac. 801.

19. Williams v. Williams, 37 Cal. App. 603, 206 Pac. 650.

20. Code Civ. Proc., § 415.

by publication, after judgment is rendered and before the roll is made up.[1]

§ 68. Another Action Pending.—The orderly administration of the law forbids the maintenance of an action for divorce where the issues presented are involved in another pending action.[2] Thus it has been held that while an action for divorce is pending and undetermined, one of the parties thereto cannot maintain a subsequent action for a divorce against the other, on the ground that the latter had been guilty of extreme cruelty, in making certain false and malicious charges against the former in the pleadings and affidavits filed by him in the prior action, where it does not appear but that such statements were relevant and material to the issue presented in the prior action.[3] However, the pendency of an action by the husband in another state to annul the marriage does not prevent an action for divorce by the wife in California, based on causes arising subsequent to the marriage.[4] The pendency of a prior action for the same cause is ground for abatement of the second action,[5] but is waived if not pleaded.[6] But the fact that a prior action was commenced by the wife against the husband in another state, for a limited divorce from bed and board and for alimony, in which a final decree was obtained, subsequent to a California divorce which was not set up, cannot affect the validity of the judgment granting that divorce, nor avoid its force.[7]

1. In re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887. See note, 7 A. L. R. 1148, as to power to amend nunc pro tunc return of service of summons in divorce suit.

2. See ABATEMENT AND REVIVAL, vol. 1, p. 23.

3. De Haley v. Haley, 74 Cal. 489, 5 Am. St. Rep. 460, 16 Pac. 248. See supra, § 32.

4. Simpson v. Simpson, 5 Cal. Unrep. 139, 41 Pac. 804.

5. See ABATEMENT AND REVIVAL, vol. 1. p. 23.

6. See ABATEMENT AND REVIVAL, vol. 1, p. 35.

7. Estate of McNeil, 155 Cal. 333, 100 Pac. 1086. See to same effect, Estate of James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

§ 69. Death of Party Pending Action.—An action solely for the purpose of procuring a judgment of divorce between the parties is purely a personal action and does not survive the death of either party, whether the death occurs before or after the judgment, and whether the action is pending in the trial or the appellate court.[8] And since the rights of the parties to the community property is but incidental, the action cannot be continued for the purpose of determining the rights of property; or, if there was originally no issue upon the subject, it cannot be revived in case of death after judgment for the purpose of having this question adjudicated.[9]

VII. PLEADINGS.

Of Plaintiff.

§ 70. Complaint Generally—Supplemental Complaint.—The complaint in a divorce action must contain allegations of all facts essential to the cause of action and to the plaintiff's right to maintain the suit. The complaint should, of course, contain allegations of marriage,[10] and of residence within the state and county for the required period,[11] and of the facts constituting the particular cause for divorce relied upon.[12] And by virtue of a statute enacted in 1913,

"The complaint must set forth, for the statistics required to be collected by the state bureau of vital statistics,

8. Smith v. Smith, 124 Cal. 651, 57 Pac. 573; Gloyd v. Superior Court, 44 Cal. App. 39, 185 Pac. 995. See ABATEMENT AND REVIVAL, vol. 1, p. 74.

9. Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064.

10. Coulthurst v. Coulthurst, 58 Cal. 239; Haskell v. Haskell, 54 Cal. 262.

11. Waite v. Waite, 180 Cal. 238, 180 Pac. 941; Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; Coulthurst v. Coulthurst, 58 Cal. 239; Haskell v. Haskell, 54 Cal. 262; Bennett v. Bennett, 28 Cal. 599; Loudon v. Loudon, 46 Cal. App. 599, 189 Pac. 725; Dillon v. Dillon, 45 Cal. App. 191, 187 Pac. 27; Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362.

12. See infra, §§ 71–73.

among other matters as near as can be ascertained the following facts: (1) The state or county in which the parties were married. (2) The date of marriage. (3) The date of separation. (4) The number of years from marriage to separation. ((5) The number of children of the marriage, if any, and if none, a statement of that fact. (6) The ages of the minor children."[13]

As in the case of pleadings generally, it is not necessary or proper to set forth the evidence or allege conclusions of law,[14] or to negative defenses. For example, the plaintiff is required to set up the facts justifying her in revoking a condonation, for condonation is not a part of her case, but new matter to be pleaded in the answer.[15] Nor is it necessary for a plaintiff to allege in terms that his residence was "bona fide," as the allegation of residence necessarily implies residence in good faith.[16] As it is only residence during the year prior to the bringing of the action, allegations as to residence prior thereto are immaterial.[17]

Supplemental complaint.—The plaintiff in a divorce action may file a supplemental complaint with reference to matter which may be consistent with and in aid of the case made by the original complaint, and which occurred between the filing of the original complaint and the trial or judgment in the action. But he cannot properly file such a complaint after judgment or set up a new cause of

13. Code Civ. Proc., § 426a.

14. Hubbell v. Hubbell, 7 Cal. App. 661, 95 Pac. 664. See PLEADING.

15. Neely v. Neely, 179 Cal. 232, 176 Pac. 163.

16. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837, stating that if anything to the contrary is intimated by language used in Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362, it must be considered as disapproved.

17. De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045, holding that an averment that for six years prior to the last year and four months plaintiff and defendant lived upon a yacht, which sailed upon the high seas from port to port, does not state facts fatally inconsistent with her averment of residence within the state during all of such time.

action therein.[18] If a new cause of action should be set up, the action in regard thereto must be considered as being commenced when the supplemental complaint was filed.[19]

§ 71. Pleading Cruelty.—In pleading extreme cruelty, the plaintiff should not allege cruelty in general terms, but should set forth the particular acts or conduct relied on as constituting cruelty, with reasonable certainty as to time and place,[20] and allege that they resulted either in the infliction of grievous bodily injury or grievous mental suffering.[1] The element of wrongfulness must appear in the complaint. However, the pleader is not required to adopt the exact phraseology of the statute, and need not in terms allege that the infliction was "wrongful," at least in the absence of special demurrer,[2] it being sufficient if the only rational inference from the acts of extreme

18. Code Civ. Proc., § 464. Gleason v. Gleason, 54 Cal. 135. As to supplemental pleadings generally, see PLEADING.

19. Valensin v. Valensin, 73 Cal. 106, 14 Pac. 397.

20. Zartarian v. Zartarian, 47 Cal. App. 90, 190 Pac. 196; Hubbell v. Hubbell, 7 Cal. App. 661, 95 Pac. 664.

1. Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330; Smith v. Smith, 124 Cal. 651, 57 Pac. 573 (holding that a complaint which merely alleges that defendant has treated the plaintiff in a cruel and inhuman manner, that he has applied coarse epithets to her which are described, and has accused her of a want of chastity, without alleging either grievous bodily injury or grievous mental suffering as the result of the cruelty alleged, does not state a cause of action); Zartarian v. Zartarian, 47 Cal. App. 90, 190 Pac. 196. See Hubbell v. Hubbell, 7 Cal. App. 601, 95 Pac. 664, holding that an allegation that defendant instigated her son-in-law at their residence to make a violent personal assault upon plaintiff, "as a result of which plaintiff sustained serious personal injury," is not subject to a special demurrer for uncertainty in "that it does not appear therefrom how the plaintiff could have sustained serious personal injury from an assault," for if the clause objected to be eliminated, and if the assault did not and could not have caused serious personal injury, it is sufficient that the assault could have been one of the factors in causing the plaintiff grievous mental suffering, where such charge was made in the complaint.

2. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546; McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460.

cruelty specified and described necessarily involves the implication of injustice or wrongfulness.[3] So also the exact day and place of the occurrence of each particular act need not be alleged; and where the conduct complained of is continued, particularity of time and place become unimportant and generally impracticable, and should not be required.[4] Nor is it necessary that every act complained of need be specifically described, it being enough if sufficient facts are alleged to establish legal cruelty as a ground for divorce.[5] Of course, the complaint need not allege matters of evidence, such as the date of the letters of the plaintiff opened by the defendant, the names of their authors or their contents.[6] Where the

3. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546; McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460; Knapp v. Knapp, 23 Cal. App. 10, 136 Pac. 719 (holding that a complaint states a cause of action where it alleges generally that the defendant wrongfully and willfully inflicted upon the plaintiff a course of grievous mental suffering and grievous bodily injury, and further specifically alleges, among other acts of violence, that the defendant, without reasonable cause or excuse, slapped the plaintiff's face and injured her person so as to leave black and blue spots thereon for several days). Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099 (holding that where a cross-complaint alleges that the plaintiff had treated the defendant "with extreme cruelty," which is followed by a specification of acts which necessarily imply unlawfulness, cruelty and brutality, and culminates in the positive averment that by reason of those acts specified the defendant and cross-complainant has suffered and does suffer great and grievous physical and mental suffering, it presents a clear case of the "wrongful infliction of grievous bodily injury and grievous mental suffering," within the meaning of the code).

4. Zartarian v. Zartarian, 47 Cal. App. 90, 190 Pac. 196; Johnson v. Johnson, 4 Cal. Unrep. 446, 35 Pac. 637 (holding that a complaint alleging extreme cruelty, in that "about three years ago" defendant, without cause, struck plaintiff, and since has continually, whenever they have been together, used vile language to her, is not demurrable as failing to specify the acts relied on).

5. Zartarian v. Zartarian, 47 Cal. App. 90, 190 Pac. 196.

6. Hubbell v. Hubbell, 7 Cal. App. 661, 95 Pac. 664, holding that a complaint charging the defendant with extreme cruelty inflicting grievous mental suffering for five years before suit, in exercising and maintaining an unreasonable espionage over plaintiff and his affairs, and manifesting unreasonable, improper and unnecessary jealousy of plaintiff, and making false charges of infidelity, knowing them to be

facts relied on as constituting extreme cruelty are not sufficiently alleged, no evidence in support of them can be received.[7] And while it may be permissible to show a general course of conduct as supplementing specific acts of cruelty where only the specific acts are set out, evidence of specific acts is not admissible under a general allegation of cruel treatment.[8]

§ 72. Pleading Desertion.—A complaint for divorce on the ground of desertion must allege the desertion, show how long it has continued; and that it continued up to the commencement of the action. The willful desertion of the plaintiff by the defendant is the ultimate fact to be pleaded and found. And where there has been a separation of the parties by agreement, an offer of reconciliation, made in good faith by the plaintiff, and the refusal thereof by the defendant, are probative facts, tending to prove desertion, and need not be pleaded or found.[9] When the complaint alleges that the defendant, on or about a specified date, more than a year prior to the filing of the complaint, "willfully and without cause, deserted and abandoned plaintiff, and has continued to live separate and apart from plaintiff, against her will, and without her consent," it is not necessary to allege that the desertion lasted longer than the reasonable period mentioned in section 124 of the Civil Code. Nor is it necessary in such case that the pleading should contain an added averment that in the abandonment of the plaintiff, defendant remained away from her without sufficient cause, because the words "willfully and without cause"

false, and spying upon him in an offensive manner, and prying into his personal affairs, as a physician, and seizing and keeping letters addressed to him by patients, and in instigating her son-in-law to make a violent personal assault upon plaintiff, sufficiently shows grievous mental suffering, as against a general demurrer.

7. Zartarian v. Zartarian, 47 Cal. App. 90, 190 Pac. 196.

8. Pedreira v. Pedreira, 32 Cal. App. 711, 164 Pac. 30.

9. Howard v. Howard, 134 Cal. 346, 66 Pac. 367.

clearly modify the words "has continued to live" as well as the verbs "deserted" and "abandoned."[10-11] A complaint for divorce by a wife against her husband, alleging that on a certain day the defendant voluntarily separated himself from the plaintiff, without any fault on her part, and with intent to desert her, and has continued since, and still does continue, to desert her, is sufficient in the absence of a special demurrer.[12] In charging a desertion by a persistent refusal of matrimonial intercourse, it is not necessary to use the words "persistent refusal" employed in the statute, if equivalent words are used.[13] Where a complaint states facts showing a departure of the plaintiff caused by defendant's cruelty, it is not necessary to give those acts the statutory designation of "willful desertion," as the desertion as a legal conclusion follows from the facts constituting desertion.[14] And a plaintiff is

10-11. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120.

12. Sheridan v. Sheridan, 134 Cal. 88, 66 Pac. 73.

13. A complaint which charges that on a date more than one year prior to the commencement of the action the defendant, without cause or reason, withdrew from the marriage bed, "and ever since said time has refused to have reasonable or any matrimonial intercourse with the plaintiff," as matter of pleading adequately charges the persistency of the refusal as against a general demurrer, though not using the words "persistent refusal" employed in section 96 of the Civil Code. Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694. See Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234, holding that a complaint for divorce on the ground of willful desertion which contains the usual general allegation that "defendant willfully and without cause, or provocation, deserted and abandoned plaintiff, with intent to desert said plaintiff, and ever since said time has continued to live separate and apart from plaintiff without her consent, and against her will, and with intent to desert and abandon her, and without fault of plaintiff," in the absence of a demurrer for a definite statement of the facts, is not subject to the objection for the first time on appeal that it does not inform defendant that the desertion was intended to be established under the first provision of section 96 of the Civil Code.

14. Benton v. Benton, 122 Cal. 395, 55 Pac. 152, holding that a complaint, which sets forth acts of extreme cruelty of the husband, and avers that by reason thereof plaintiff was compelled to depart from the family dwelling place, and that the cruel treatment was such as to render it impossible for plaintiff to continue to live with him, states facts which constitute

not required to show negatively that no cause for desertion existed, for none appearing, the law will not presume one.[15]

§ 73. Charging Adultery, Intemperance or Neglect.—Adultery should be charged with such reasonable certainty as to time, place and person that the defendant may know the charge that he is called upon to meet, and be enabled to prepare his defense.[16] The name of the person with whom the adultery was committed should be stated if known, and if the name be unknown, that fact should be stated.[17] It has been held sufficient, within the rule, however, to charge the defendant with a series of adulteries with the same unknown person, at several specified cities, during a period of about two and one-half months, without alleging either the name of the adulteress or the particular place, house or locality where the adulteries were committed.[18] And an allegation that the defendant committed adultery at divers times with unknown persons in a specified city, though subject to special demurrer, is sufficient in the absence thereof.[19]

Habitual intemperance.—In pleading habitual intemperance as a ground for a divorce, it is not necessary that the complaint should allege the particular acts and conduct of the defendant, showing that he was intoxicated to the extent required by section 106 of the Civil Code, defining habitual intemperance.[20] In other words, it is not necessary to state how often the defendant was intoxicated, to what extent, and upon what occasions, or what he said or

desertion under section 98 of the Civil Code.

15. Morrison v. Morrison, 20 Cal. 431; Conant v. Conant, 40 Cal. 249, 70 Am. Dec. 717.

16. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 Pac. 784.

17. Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 Pac. 784.

18. Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 Pac. 784.

19. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

20. Reading v. Reading, 96 Cal. 4, 30 Pac. 803; Forney v. Forney, 80 Cal. 528, 22 Pac. 294.

did when so intoxicated to cause mental anguish.[1] It is sufficient to allege in the language of the statute that the defendant had been habitually intemperate to such degree as reasonably to inflict a course of great mental anguish upon the plaintiff.[2] So also an allegation that the "defendant, for more than five years last past, disregarding his duties as a husband toward the plaintiff, has been guilty of habitual intemperance," is sufficient in the absence of a special demurrer, though it does not state that the defendant was disqualified, by the use of intoxicating drinks, a greater portion of the time, "from properly attending to business," or that his conduct inflicted upon the plaintiff "a course of great mental anguish."[3]

Willful neglect.—It will be observed that section 105 of the Civil Code defining willful neglect, contains a statement of two sets of facts—differing from each other—which are included within the expression "willful neglect" found in section 92 of the same code. The use of the general expression of section 92 in a complaint, therefore, does not inform the defendant of the ultimate fact on which the plaintiff relies, and is insufficient of itself.[4]

§ 74. Joinder of Causes of Action.—A complaint for divorce may set forth several causes for divorce, if they are alleged in separate counts.[5] Each cause of action thus set up must be complete in its allegations, though it is proper to refer to and adopt in one count the allegations

1. Forney v. Forney, 80 Cal. 528, 22 Pac. 294.

2. Forney v. Forney, 80 Cal. 528, 22 Pac. 294, holding, further, that findings in the same language are sufficient.

3. Reading v. Reading, 96 Cal. 4, 30 Pac. 803.

4. Devoe v. Devoe, 51 Cal. 543.

5. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120; Reading v. Reading, 96 Cal. 4, 30 Pac. 803; Haskell v. Haskell, 54 Cal. 262. But see Keller v. Keller, 1 Lab. 62, where it is questioned whether a party suing for divorce can unite in a complaint charges of adultery and of cruelty. As to joinder of causes of action generally, see ACTIONS, vol. 1, p. 345 et seq.

made in another,[6] unless the matters referred to constitute the gravamen of the action.[7] As a general rule, if there is one good count in the complaint, a judgment of divorce will not be reversed because the others may be defective.[8] And, it has been held, that where a count containing the averment as to property and the custody of a child stated no cause of action, the phrase "for a further and separate cause of action" therein may be disregarded as surplusage, not affecting the substantial rights of the parties; and upon proof of the only cause of action stated, the relief as to the property and custody of the child may be granted as incidental thereto. The judgment, in such case, being effectual on the only ground of relief sufficiently stated, the recital and finding therein as to the right to a divorce on the other ground stated may be rejected as entirely immaterial, as the judgment is effectual without it.[9] A complaint charging extreme cruelty which alleges instances of voluntary intoxication in connection with other matters as constituting acts of cruelty, does not on that account plead two separate causes for divorce, and is not therefore subject to the objection that separate causes of action are not separately stated.[10]

§ 75. Joinder of Cause of Action as to Property.—At an early date it was said that a partition of the common prop-

6. Reading v. Reading, 96 Cal. 4, 30 Pac. 803; Haskell v. Haskell, 54 Cal. 262.

7. Haskell v. Haskell, 54 Cal. 262.

8. De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045; Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137; Cassidy v. Cassidy, 63 Cal. 352.

9. Vine v. Vine, 12 Cal. App. 458, 107 Pac. 702 (holding further that where the answer of defendant and the issues joined upon his cross-complaint supply any deficiency in the complaint, when the defective count thereof is excluded, it must be presumed, in the absence of any showing to the contrary, that evidence in support of all the material findings was received without objection, and it must be held that any error of the court in overruling a demurrer to the defective count rendered entirely harmless). And see, to the same effect, Murray v. Murray, 115 Cal. 266, 56 Am. St. Rep. 97, 37 L. R. A. 626, 47 Pac. 37.

10. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120.

erty is one of the direct results of a decree for divorce, and is part and parcel of the decree to be rendered, and consequently is necessarily one of the proper subjects of the action. And so it was held proper for the plaintiff in such action to join as defendant anyone claiming an interest in the community property in order that she might obtain a complete determination.[11] This rule is not limited to cases where a division of the community property is sought but applies also where there is no community property and the wife is seeking divorce with support, claiming that the husband has transferred his separate property to a third party with intent to defraud her of her right to subject it to her claim for maintenance and alimony. In that event, she may join the fraudulent grantee as a defendant and pray that the conveyance be decreed to be void as to her, and that a lien be imposed upon the property as security for the payment of such sums as may be directed by the court to be paid to her.[12]

§ 76. Serving Complaint on Corespondent.—It is provided that

"When in an action for divorce adultery is charged against either party and the person with whom such adultery is alleged to have been committed by such party is named in any of the pleadings, a copy of such pleadings must be personally served on such named person; or, in case such named person cannot be found, such notice of the action and of the connection of such person therewith shall be given as shall be ordered by the court; the said person so served shall have the right to appear and plead

11. Kashaw v. Kashaw, 3 Cal. 312, construing the act in relation to husband and wife, which required a division of the community property. Although a contrary view was expressed in the opinion in department in Cummings v. Cummings, 2 Cal. Unrep, 774, 14 Pac. 562, the supreme court upon rehearing in bank expressly declined to determine the questions; Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442.

12. Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776.

and be heard in such action in the same manner and to the same extent as the parties to the action."[13]

The purpose of this section is to give one whose reputation might be assailed in divorce proceedings an opportunity to appear and defend against the offensive charges. But it is an open question whether evidence touching the issue of adultery can be received where the corespondent has not been served as required by the statute.[14] The statute has no application, however, to a case where there is neither allegation nor offer of evidence charging the third party with adulterous conduct, but where the charge was that during the marital relationship the defendant had become the affianced husband of another woman and that publicity given to this fact caused the defendant such mental suffering as to stamp the act as one of cruelty; hence evidence showing the husband's relations with such other woman is material, relevant and competent in support of the defendant's recriminatory charge of cruelty and is admissible although the third party was not served with the pleadings.[15]

Of Defendant.

§ 77. In General.—As in actions generally,[16] a defendant in a divorce action may demur or answer. Any ambiguities or uncertainties in the complaint should be raised by special demurrer, or they will be deemed waived.[17] Any error in overruling a special demurrer to one of

13. Code Civ. Proc., § 1019. See note, 1 A. L. R. 1414, as to necessity of serving process upon corespondent in divorce suit.

14. See Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85, in which the district court of appeal held it proper to exclude a deposition of a corespondent, not served as required, in which she detailed at length the facts of her meretricious relationship with the defendant husband. But the supreme court in denying a hearing in that court expressly withheld its approval of this holding, saying it was not necessary to the decision of the case.

15. Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85.

16. See PLEADING.

17. Reading v. Reading, 96 Cal. 4, 30 Pac. 803 (allegation of residence); Dillon v. Dillon, 45 Cal. App. 191, 187 Pac. 27.

several causes of action stated in a complaint is without prejudice to the defendant, if the court finds in his favor on that cause of action.[18] Condonation is a specific defense to an action for divorce and should be pleaded like any other defense,[19] though it has been said that if the evidence shows condonation it is the duty of the court, even without a pleading, to find to that effect.[20] Facts in recrimination should be pleaded, or they cannot be proved, but it would seem they are pleaded and proved as a defense simply and in bar of the plaintiff's cause.[1] Allegations showing merely that the plaintiff had failed to obtain a decree in a prior divorce action are insufficient to show such cruelty as justified the defendant in deserting.[2]

§ 78. Cross-complaint.—In England, the practice adopted by the ecclesiastical courts permitted the defendant to file a cross-complaint and obtain affirmative relief thereon.[3] And this has long been the practice in California.[4] This practice has been said to be in harmony with the code pro-

18. Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 Pac. 784. See APPEAL AND ERROR, vol. 2, p. 1012.

19. Hunter v. Hunter, 132 Cal. 473, 64 Pac. 772; Stampfli v. Stampfli, 35 Cal. App. Dec. 360, 199 Pac. 829; Johnson v. Johnson, 4 Cal. Unrep. 446, 35 Pac. 637 (citing Bishop on Marriage and Divorce, §§ 619, 645).

20. Hunter v. Hunter, 132 Cal. 473, 64 Pac. 772; Stampfli v. Stampfli, 35 Cal. App. Dec. 360, 199 Pac. 829.

1. Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; De Haley v. Haley, 74 Cal. 489, 5 Am. St. Rep. 460, 16 Pac. 248; Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85.

2. Brandt v. Brandt, 178 Cal. 548, 174 Pac. 55.

3. Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648 (announcing practice in ecclesiastical courts).

4. Blakely v. Blakely, 89 Cal. 324, 26 Pac. 1072; Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1142; Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648; Bovo v. Bovo, 63 Cal. 77; Coulthurst v. Coulthurst, 58 Cal. 239; Lowell v. Lowell, 55 Cal. 316. In De Haley v. Haley, 74 Cal. 489, 5 Am. St. Rep. 460, 16 Pac. 248, McKinstry, J., remarked that the right to file a cross-complaint in divorce actions was doubtful. These remarks took the profession by surprise (Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648), and the practice is now well established.

visions on the subject of cross-complaints,[5] and it is recognized in the Civil Code.[6] It is held that a cross-complaint for divorce may be filed in a suit to annul a marriage.[7] Whether or not a cross-complaint for divorce by the wife is an appropriate proceeding in an action by the husband for the custody of a child is immaterial, where the plaintiff husband by his conduct has estopped himself from raising that question by failure to object either to the original or amended cross-complaint for divorce, or to proof of the cause of action for divorce stated in the amended cross-complaint.[8] A cross-complaint must state facts sufficient to entitle the cross-complainant to affirmative relief, and must be personally verified by him.[9] It cannot be helped out by the averments of any of the other pleadings in the action, but like a complaint, it must itself contain all the requisite facts.[10] Whether or not a defendant may set up a new cause for divorce accruing since the commencement of the action, the plaintiff cannot object upon appeal if the case is tried upon the theory the issues are properly joined.[11] The settlement of property rights is incident to every action of divorce, when there is any property involved, and such settlement may

5. An action for a divorce, being based upon the violation of some duty or obligation imposed by the contract of marriage, although that contract creates the status of matrimony to which the duties or obligations are annexed, is nevertheless an action upon "contract," within the meaning of section 442 of the Code of Civil Procedure, which provides for the filing of a cross-complaint seeking affirmative relief. Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1142; Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648. As to cross-complaints generally, see PLEADING.

6. Civ. Code, § 128.

7. Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648. See MARRIAGE.

8. Wakefield v. Wakefield, 16 Cal. App. 113, 116 Pac. 309.

9. Civ. Code, § 128.

10. Coulthurst v. Coulthurst, 58 Cal. 239 (holding defendant's cross-complaint materially defective, for the reason that it contained no averment of marriage, or residence for the required period).

But see supra, § 62, as to the necessity of residence in the state on the part of the cross-complainant.

11. Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083. See APPEAL AND ERROR, vol. 2, p. 239.

be sought in the cross-complaint as well as in the original complaint.[12] When a cross-complaint entitling the defendant to affirmative relief is filed, the action cannot be dismissed by the plaintiff without the consent of the defendant.[13] A refusal of the trial court to consider a cross-complaint in an action for a divorce, except by way of answer and defense, is error without injury, where the record does not contain the evidence, and the findings show that the cause of action alleged in the cross-complaint cannot be true.[14]

VIII. TRIAL OR HEARING.

In General.

§ 79. Private Sittings.—In this country it is a first principle that the people have a right to know what is done in their courts.[15] Owing, however, to the nature of the inquiry in divorce proceedings generally, laws have been enacted from time to time in various jurisdictions for the purpose of curbing a certain harmful practice that is sometimes manifested in those who are inclined to feed a private and morbid curiosity through the channels of a public right.[16] In California, the legislature has provided that in actions for divorce, and other enumerated cases,

"The court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel."[17]

The power of the legislature thus to authorize the hearing of divorce cases in camera has been expressly upheld. The object of the act is palpable. It was to secure de-

12. Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1142.

13. Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1142 (construing Code Civ. Proc., § 581). See DISMISSAL, DISCONTINUANCE AND NONSUIT, ante, p. 502.

14. Blakely v. Blakely, 89 Cal. 324, 26 Pac. 1072.

15. In re Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78, 21 L. R. A. 755, 34 Pac. 227. See TRIAL.

16. 9 Ruling Case Law, 428.

17. Code Civ. Proc., § 125.

corum in the conduct of trials involving the relation of the sexes and to protect witnesses of refined sensibilities from the ordeal which they might otherwise have to pass through in giving testimony of a delicate or filthy nature in the presence of a crowd of vulgar or curious spectators; it was not intended to protect the public from the contaminating influence of prurient revelations often made in such cases, or to prohibit the publication of the proceedings and evidence in cases tried with closed doors. And a court cannot under this act forbid the making of a public report or publication of any character of the testimony in the case.[18]

§ 80. Right to Fair Trial.—In actions for divorce, a party has the same right as any other litigant in any other class of actions, not only to the opportunity to present fully his or her case, but to every reasonable assistance of the court in the premises.[19] The refusal of the court to permit a defendant to complete her testimony in support of the denials of her answer, or to introduce any evidence upon her cross-complaint for divorce, and its summary denial of defendant's cross-complaint, and finding that its allegations were untrue, after its refusal to hear the same, is such irregularity of the court preventing the defendant from having a fair trial as to require a reversal of judgment and of its order denying a new trial to the defendant.[20] But the action of a trial court in ordering a divorce cause submitted does not deprive a party of a fair trial where it appears that such action was agreeable to all parties.[1]

Denial of right to make defense for contempt.—In an action for divorce the court cannot deprive the defendant

18. In re Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78, 21 L. R. A. 755, 34 Pac. 227.

19. Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483.

20. Anderson v. Anderson, 4 Cal. App. 269, 87 Pac. 558.

1. Loudon v. Loudon, 46 Cal. App. 599, 189 Pac. 725.

of his right to make a defense because of his disobedience of its orders, such as an order for alimony;[2] nor can it on that ground deny a defendant the process provided by law for procuring testimony.[3] Such disobedience constitutes a contempt for which the only punishment it is competent to impose is that authorized by the code.

§ 81. Trial by Jury.—As the constitution secures the right only in those cases in which it existed at common law, and as the right of trial by jury did not exist in divorce cases at common law, it follows that a trial by jury in a divorce action cannot be demanded as a matter of right under the constitution. In this connection it has been said that it is quite immaterial whether an action for divorce be a case in equity or not, so long as it is a case in which the right of trial by jury did not exist at common law, or otherwise.[4] However, it is optional with the judge to submit special issues to the jury.[5] While it is the usual practice for trial courts to hear divorce cases without a jury there are a number of cases in the books in which the issues were submitted to juries.[6] The verdict in such case is only advisory, but where it appears to have been regularly returned and entered in the minutes of the court, and thereupon the court orally orders judgment to be entered thereon, such order necessarily includes an approval and adoption of the verdict and constitutes a rendition of judgment. And, when the order is made, it becomes the

2. Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122 (holding further that the provision then contained in Code Civ. Proc., § 1991, authorizing the court to strike out the answer for the defendant's refusal to subscribe his deposition was not applicable to an action for divorce); Johnson v. Superior Court, 63 Cal. 578; Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167. See CONTEMPT, vol. 5, p. 933.

3. Johnson v. Superior Court, 63 Cal. 578.

4. Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234. See JURY.

5. Cleghorn v. Cleghorn, 66 Cal. 309, 5 Pac. 516.

6. Holt v. Holt, 107 Cal. 258, 40 Pac. 390; Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801; Dunn v. Dunn, 62 Cal. 176; Mahone v. Mahone, 19 Cal. 627; Fuller v. Fuller, 17 Cal. 605; Gaskins v. Gaskins, 1 Lab. 381.

duty of the clerk to transcribe it in the minute-book of the court, and to enter the judgment as ordered. The failure of the clerk to do so is a failure to perform a ministerial duty which can afterwards be performed at his own instance, or by direction of the court at any time.[7]

§ 82. Dismissals — Continuances.—As in civil actions generally, it is the well-established rule that the plaintiff in divorce proceedings may as a matter of right dismiss his complaint without the consent of the defendant, at any time before submission of the case and before the defendant has filed a pleading seeking affirmative relief.[8] It is expressly provided that "after the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other."[9] Where it appears to the court that the plaintiff cannot furnish proof of a residence, the court may dismiss the action.[10] Under the equity practice a judgment dismissing an action for divorce may be entered where both parties are seeking a decree, and the evidence discloses them to be equally guilty of the misconduct alleged.[11] The mere filing by the attorney of the plaintiff, in a divorce action, of a paper reciting that the action is dismissed does not, without the entry of a judgment of dismissal, operate as a dismissal of the action so as to deprive the court of further jurisdiction in the

7. Holt v. Holt, 107 Cal. 258, 40 Pac. 290 (holding that where a verdict of the jury was orally adopted by the court and judgment was ordered to be entered thereon but no written findings approving and adopting the verdict were filed, the court had authority subsequently to order judgment entered nunc pro tunc as of the date when the verdict was adopted notwithstanding the judge of the court was re-elected between the time of the trial and the completion of the record thereof.

8. 9 Ruling Case Law, 429. See DISMISSAL, DISCONTINUANCE AND NONSUIT, ante, p. 502.

9. Civ. Code, § 131. Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032.

10. Gould v. Gould, 63 Cal. Dec. 425, 205 Pac. 1072.

11. Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672.

matter, as such a paper is merely a request or order for a dismissal of the action.[12]

Continuances.—As in civil actions generally,[13] applications for continuances in divorce actions are addressed to the sound discretion of the trial court, yet the trial court should be most liberal in granting continuances in such cases because the public interest demands that both the plaintiff and the defendant shall have full opportunity to be heard and to present all of their evidence.[14]

§ 83. New Trial.—In accord with the public policy that divorces should be granted only where the fullest opportunity has been afforded both sides to be heard and to present all of their evidence, it is the settled rule that a more liberal policy should prevail in granting new trials in divorce cases than in ordinary actions.[15] While the fact that a party trying his own case is not an attorney and is unfamiliar with methods of procedure does not ordinarily relieve him from mistakes concerning rules of practice, that fact may be taken into consideration in a motion for a new trial in a divorce action. Thus, although a wife conducting her own case is prevented by accident from attending court, but fails to proceed in the regular manner in asking a continuance, the fact that she is not an attorney may be taken into consideration in determining

12. Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298.

13. See CONTINUANCES, vol. 5, p. 968.

14. Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298 (a divided court holding that the refusal of the trial court to grant a continuance not to be an abuse of discretion). See also Simpson v. Simpson, 5 Cal. Unrep. 139, 41 Pac. 804, holding, under the peculiar facts of that case, that the trial court did not abuse its discretion in denying the motion for a continuance.

15. Smith v. Smith, 145 Cal. 615, 79 Pac. 275; Lord v. Lord, 1 Cal. Unrep. 417 (holding that in a suit for divorce where there has been imputed to the defendant extreme cruelty, the court, in considering a motion for a new trial, is justified in being influenced by the thought that through the findings from the testimony at the trial the defendant may suffer irreparable injury of a most painful character).

whether she was wanting in diligence.[16] On the other hand, it has been held that a decree of divorce from the wife granted to the husband for her fault must be presumed correct; and she cannot keep open indefinitely a motion for a new trial, merely because an allowance was made to her for a transcript of the evidence, which the husband was wholly unable to pay. It was her duty to prosecute her motion with reasonable diligence; or it will be dismissed for laches. If a wife accepts alimony granted by a decree, or, in other words, receive the benefits thereunder, she waives her right to object thereto and to move for a new trial or to appeal.[17] But the receipt of money under a decree obtained by the wife in an action for maintenance, which was continued in force by the decree of divorce for the period of six months, cannot estop the defendant from assailing the decree of divorce on motion for new trial.[18] The motion for new trial must be made upon the papers specified in the statute.[19] Where a new trial is granted, the judgment is in effect set aside,[20] and the

16. Smith v. Smith, 145 Cal. 615, 79 Pac. 275.

17. Storke v. Storke, 132 Cal. 349, 64 Pac. 578. See APPEAL AND ERROR, vol. 2, p. 844; NEW TRIAL.

18. Smith v. Smith, 145 Cal. 615, 79 Pac. 275.

19. Code Civ. Proc., § 658. See Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672 (relating to the statement on the motion formerly required, and holding a specification in the statement assailing a finding of fact on the issue of adultery in favor of the plaintiff, as not supported by the evidence, is sufficient which states that "the evidence introduced in this action fails to show that the defendant, at the time stated, was guilty of adultery" with the person named in the complaint); Keating v. Keating, 23 Cal. App. 384, 138 Pac. 118, holding that where the corespondent and the defendant agreed that the defendant should prepare a statement to be used by both on their respective motions for a new trial, but the plaintiff was not a party to the agreement and was served with the statement in support of the motion of the defendant alone, the corespondent is not entitled to rely on the statement of the defendant. The failure of the defendant to carry out the agreement was no ground for relief from the corespondent's default in preparing and serving a statement.

20. Sharon v. Sharon, 84 Cal. 424, 23 Pac. 1100 (holding that the legal effect of the reversal of an order denying a new trial in an action for divorce is to vacate and set aside the judgment for divorce and also a judgment for alimony and

court has power thereafter to allow an amendment to the complaint, hear the issues raised thereby, make findings and enter judgment thereon.[1]

After default.—Section 130 of the Civil Code, to the effect that no divorce can be granted upon the mere default of the defendant, but that the court shall require proof of the facts alleged before granting relief, merely declares the policy of the law in divorce cases; and the effect of that provision is not to raise "issues of fact," nor to constitute the taking of proof submitted by the plaintiff, in cases where the defendant has not answered, a "trial," as those terms are used in the provisions relating to new trials. The re-examination of an issue of fact, provided for in section 656 of the Code of Civil Procedure, is to be had only where there has been a trial of an issue arising where a material averment made on the one side is controverted on the other, as provided in sections 588 and 590 of the same code; and the only remedy where a defendant has made default, and suffered judgment upon an ex parte showing, in a divorce proceeding, as in any other, is by motion under section 473 of the Code of Civil Procedure, and not by motion for a new trial.[2]

Findings and Conclusions.

§ 84. Necessity for.—The Civil Code requires that the court in actions for divorce file its decision and conclusions of law "as in other cases."[3] As in other cases, findings are required only upon a trial of issues of fact raised by the pleadings of the respective parties, and only then in cases where findings have not been waived by the parties

costs based upon that judgment); Stinnett v. Superior Court, 36 Cal. 275, 171 Pac. 1076. See NEW TRIAL.

1. Stinnett v. Superior Court, 36 Cal. App. 275, 171 Pac. 1076.

2. Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122. See infra, § 99.

3. Civ. Code, § 131. See Lyons v. Lyons, 18 Cal. 447, as to findings in equity under the former practice. See TRIAL.

as provided in section 634 of the Code of Civil Procedure.[4] While there has been some confusion in the decisions as to the necessity for findings where the defendant makes default, the question is now put at rest by a late decision of the supreme court that no findings are necessary in such a case.[5] The question turns upon the meaning to be given to the phrase "as in other cases." It has been held that the hearing required by law to be had before the court after entry of a default, in an action for divorce, was not a trial of issues of fact within the meaning of the provisions of the Code of Civil Procedure.[6] And reading section 131 of the Civil Code in the light of the provisions of the Code of Civil Procedure with the construction placed upon them, the language of the section of the Civil Code has been regarded as constituting rather a recital of the rule of procedure laid down in the Code of Civil Procedure than the declaration of a different rule applicable to divorce cases. The phrase "as in other cases" has thus been construed to mean that in all actions for divorces where issues have been raised by the pleadings of the parties so as to require a trial thereon, findings must be filed unless waived by the parties as provided in section 634 of the Code of Civil Procedure; but they are not required where the defendant makes default.[7]

4. Waldecker v. Waldecker, 178 Cal. 566, 174 Pac. 36.

5. Waldecker v. Waldecker, 178 Cal. 566, 174 Pac. 36.

6. Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122.

7. Waldecker v. Waldecker, 178 Cal. 566, 174 Pac. 36; Hunter v. Hunter, 111 Cal. 261, 52 Am. St. Rep. 180, 31 L. R. A. 411, 43 Pac. 756; Reading v. Reading, 96 Cal. 4, 30 Pac. 803 (holding that the fact that the court amended the judgment after it was entered, by stating the fact that the plaintiff was a resident of the county for more than five years prior to the commencement of the action, is not material, in the absence of an answer by the defendant, no findings being required in such case); In re Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.

This conclusion expressed in the text is contrary to the views expressed in the cases of Perkins v. Perkins, 29 Cal. App, 68, 154 Pac. 483, and Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099, and they

Likewise findings are not necessary where the defendant admits the facts,[8] or has waived express findings thereof.[9] While the absence of findings in a case in which they are required is an error, which may justify a reversal,[10] it is not a jurisdictional defect, and will not render a judgment void,[11] or subject to collateral attack.[12]

§ 85. Requisites Generally.—The findings, when required, must respond to all the material issues made by the pleadings[13] and evidence.[14] As in other cases, the court should find the ultimate, not the probative, facts.[15] And a finding which amounts to nothing more than a mere conclusion

must, therefore, be deemed to be overruled.

Where the defendant defaults, the findings, if made, form no part of the judgment-roll. See APPEAL AND ERROR, vol. 2, p. 517.

8. Waldecker v. Waldecker, 178 Cal. 566, 174 Pac. 36; Fox v. Fox, 25 Cal. 587. See Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837, not deciding the point.

9. Waldecker v. Waldecker, 178 Cal. 566, 174 Pac. 36.

10. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; Pierson v. Pierson, 15 Cal. App. 567, 115 Pac. 461. See infra, § 129.

11. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; In re Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.

12. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837, overruling certain intimations to the contrary in Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362.

13. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297; Cassidy v. Cassidy, 63 Cal. 352. But see Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137 (holding, in an action for divorce for willful desertion and failure to provide the necessaries of life, where the answer takes issue upon both grounds of divorce alleged in the complaint, an affirmative defense in the answer alleging that the defendant has at all times been willing and has repeatedly offered to take plaintiff and their minor children, and provide for them the necessaries of life, and to perform and fulfill towards the plaintiff all the obligations of a husband, does not present any new issue which requires a separate finding; and findings upon the issues of desertion and failure to provide fully cover and include all the facts alleged in the affirmative defense); Cargnani v. Cargnani, 16 Cal. App. 96, 116 Pac. 305 (holding that a wife is entitled to findings upon the material averments of cruelty of the husband set forth in her cross-complaint, although the court has decided in favor of the plaintiff upon the allegations of his complaint).

14. See infra, §§ 88–197.

15. Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155; Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208.

of law is insufficient.[16] Findings that the plaintiff's allegations are untrue are not so general upon the allegations of specific instances of cruelty alleged as to be insufficient to support a judgment denying a divorce;[17] although a general omnibus finding that all the material facts alleged in the complaint are untrue, is insufficient, because the use of the word "material" renders the finding uncertain, it being impossible to ascertain what averments were deemed material.[18] Such a finding may be disregarded, however, where the court proceeds to make specific findings as to the truth or falsity of each and all of the particular averments in the plaintiff's complaint.[19] Of course the findings should not be inconsistent.[20] Yet in accord with the general rule that findings must be construed so as to support the judgment, findings against the plaintiff on every charge of cruelty but one and denying a divorce are not vitiated by the affirmative finding if it, when taken in connection with the entire findings, amounts merely to the finding that such act of cruelty was insufficient in itself to amount to extreme cruelty so as to entitle the plaintiff to a divorce.[1]

Conclusions of law.—It is not necessary to state in the conclusions of law in an action for divorce on the ground of extreme cruelty that defendant has been guilty of extreme cruelty toward plaintiff, or that plaintiff has not

16. Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155; Smith v. Smith, 62 Cal. 466; Cargnani v. Cargnani, 16 Cal. App. 96, 116 Pac. 306.

17. Davis v. Davis, 38 Cal. App. Dec. 323, 207 Pac. 923.

18. Turner v. Turner, 63 Cal. Dec. 1, 203 Pac. 109; Cassidy v. Cassidy, 63 Cal. 352; Stampfli v. Stampfli, 35 Cal. App. Dec. 360, 199 Pac. 829.

19. Turner v. Turner, 63 Cal. Dec. 1, 203 Pac. 109.

20. White v. White, 86 Cal. 219, 24 Pac. 996 (holding that when the wife brings a cross-complaint against the husband for a divorce, alleging among other grounds, extreme cruelty on his part, and the husband pleads the wife's desertion by way of recrimination, if the court finds against her as to the averment of cruelty, a finding that the wife left the husband and did not return is not inconsistent with the finding that she did not desert the husband).

1. Turner v. Turner, 63 Cal. Dec. 1, 203 Pac. 109.

been guilty of extreme cruelty toward the defendant, or that plaintiff has never condoned the acts of extreme cruelty on the part of the defendant; but it is sufficient to state as a general conclusion of law that plaintiff is entitled to a decree dissolving the bonds of matrimony and decreeing plaintiff and defendant each to be forever absolutely released therefrom and all the obligations arising therefrom, with such other specific conclusions as relate to the custody of the children, the division of the community property, etc. Such a conclusion, it is said, is the more common form in which conclusions of law are stated.[2]

§ 86. Particular Findings.—If the residence of the plaintiff for the statutory period is put in issue, the court, when granting a divorce, should find thereupon.[3] But no such finding is required to give the court jurisdiction to deny a divorce, particularly when both allegation and proof of such fact are amply sufficient to meet every demand.[4]

As to cause of divorce—Desertion.—Where the answer takes issue as to the cause of divorce alleged in the complaint, the court in granting a divorce must find upon such issue, or the judgment will be reversed.[5] For instance, if

2. Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

3. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837 (but qualifying Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362, and holding the failure to find upon the issue as to residence is not a jurisdictional defect); Stampfli v. Stampfli, 35 Cal. App. Dec. 360, 199 Pac. 829 (holding that a finding "that plaintiff and defendant now are and for more than one year last past, preceding the commencement of this action, have been residents of the county," sufficiently shows that the parties were residents of the county for one year preceding the commencement of the action); Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362, holding that a finding in an action for divorce that both the plaintiff and the defendant have been residing in the county and state for a period of more than one year "now last past" is not a finding that they or either of them have resided within the jurisdiction for one year next preceding the commencement of the action, and is not sufficient to sustain a decree of divorce.

4. Loudon v. Loudon, 46 Cal. App. 599, 189 Pac. 725.

5. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297 (issue as to desertion). See APPEAL AND ERROR, vol. 2, p. 1032.

desertion is charged and put in issue, the court must find thereon.[6] Since it is settled that in the case desertion manifested by the refusal of matrimonial intercourse, the refusal must be unjustifiable,[7] there must be a finding in such cases as to whether or not just cause for such refusal exists.[8] While extreme cruelty—or, indeed, conduct less reprehensible—may be a just cause for refusal of the wife to have matrimonial intercourse with her husband, it cannot be said, as a matter of law, that a finding of extreme cruelty can be regarded as in effect finding that there was just cause for the wife's conduct.[9] A finding that the defendant did not willfully or otherwise desert the plaintiff is a finding upon a matter of fact, and not a conclusion of law. And where the court finds against the fact of desertion, and that the defendant went away for medical treatment, the omission to find as to whether it was necessary for him to go away, or to remain away, for medical treatment, is immaterial.[10] Where the plaintiff claims she was justified in leaving the defendant because of his acts of cruelty, a finding which negatives every charge of cruelty alleged in the complaint must be treated as negativing a

6. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297.

7. See supra, § 39.

8. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546 (holding that a finding that the wife has persistently refused at all times to have reasonable matrimonial intercourse with her husband, although the health and physical condition of either party did not make such refusal necessary, does not establish desertion on her part, in the absence of a finding as to whether or not just cause for such refusal exists); Fink v. Fink, 137 Cal. 559, 70 Pac. 628; Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234 (holding that a finding of the court that "defendant willfully and without cause, or provocation, deserted and abandoned plaintiff, with intent to desert said plaintiff, and ever since said time has continued to live separate and apart from plaintiff without her consent, and against her will, and with intent to desert and abandon her, and without fault of plaintiff," is not a sufficient finding of refusal to have reasonable matrimonial intercourse without just cause).

9. Fink v. Fink, 137 Cal. 559, 70 Pac. 628.

10. Greer v. Greer, 135 Cal. 121, 67 Pac. 20.

charge of desertion by driving the plaintiff from her home by cruelty.[11]

Intemperance.—A finding upon habitual intemperance must find a continuance of habitual intemperance for one year.[12]

Neglect.—If the complaint, in an action for divorce, charges the defendant with willful neglect because by reason of profligacy and dissipation he has failed to provide for plaintiff, a finding that the defendant has been guilty of willful neglect by failing to provide for the plaintiff, he having the ability to do so, has been held to be outside the issues, and does not warrant a judgment for the plaintiff.[13]

Findings upon defenses.—When a defendant pleads and offers evidence of recriminatory matters he is entitled to a finding thereon, unless the evidence is so weak as not to amount to a showing that he had a subsisting cause for divorce. And his right in this respect is not affected by the fact that he pleaded such matters as a defense only, and the court finds for the plaintiff.[14] If no evidence was either introduced or offered in support of the recriminatory pleas, however, the failure to find upon them is excused.[15] And where the complaint charged the desertion by the defendant at the same time and place as the answer alleges a desertion by plaintiff, a finding that the defendant at that time and place willfully deserted the plaintiff without her consent necessarily involves a finding against

11. Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208. See Kessler v. Kessler, 2 Cal. App. 509, 83 Pac. 257, holding that in an action by a wife for divorce for extreme cruelty, findings that there was no extreme cruelty; that her condition was not so intolerable that she was forced to leave her husband; that shortly afterwards they were reconciled, and each forgave unkindness toward the other; do not warrant the conclusion that she was justified in leaving him, nor support a decree in her favor for maintenance.

12. Dunn v. Dunn, 62 Cal. 176.

13. Devoe v. Devoe, 51 Cal. 543.

14. Cassidy v. Cassidy, 63 Cal. 352; Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85.

15. Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; White v. White, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276; Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85.

the counter-averment of the answer.[16] A finding that an offense has never been condoned is a finding of fact and not a mere conclusion of law, and it is unnecessary and improper that the finding should set forth any acts or declarations bearing as evidence upon the fact of condonation.[17]

§ 87. Cruelty.—With reference to cruelty it is not sufficient for a trial court to find merely that the acts of cruelty alleged in the complaint or established by the evidence did, or did not, inflict upon the plaintiff grievous bodily injury or grievous mental suffering,[18] or that the defendant has, or has not, been guilty of extreme cruelty toward the plaintiff,[19] as such a finding is but a conclusion of law. While it is the province of the trial court to find whether or not grievous bodily injury or mental suffering results from the acts of the defendant,[20] the determination of the trial court cannot be reviewed unless it further finds upon the specific allegations and charges of cruelty averred in the complaint and embodied in the evidence.[1] An omission to recite that the acts found

16. De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

17. Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

18. Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155; Smith v. Smith, 62 Cal. 466.

19. Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483; Cargnani v. Cargnani, 16 Cal. App. 96, 116 Pac. 306.

20. Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155; Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099.

1. Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155; Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099 (stating that to satisfy the requirement of the law as to findings under a charge of extreme cruelty, there must be found at least some of the acts of cruelty specifically charged and embraced within the evidence, and also that these acts wrongfully inflicted upon the complainant grievous bodily injury or grievous mental suffering or both). But compare Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208, holding a finding "that the defendant has not treated the plaintiff with extreme cruelty, and has not inflicted upon her great mental suffering or anguish," and also, "that the defendant never inflicted upon the plaintiff grievous bodily injury nor grievous mental suffering," sufficient. See Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443, holding that in an action by the wife for maintenance,

caused the plaintiff mental suffering is immaterial if that is the only inference that can be drawn from them.[2] And where it is found that the acts of defendant inflicted grievous mental suffering upon the plaintiff, it was not necessary also to find that the charges complained of had an injurious effect upon the health of the plaintiff.[3] While it is probably true that a court will not grant a divorce upon a single act of cruelty occurring many years before suit was brought, yet where the plaintiff is not asking for a divorce based upon one act but for a decree founded upon the cumulative effect of all the acts and conduct of the defendant, extending over a period of years, it is error not to make a finding on the allegation of one act of the series which occurred some ten years before, a finding upon which would throw light on the character and disposition of the defendant, and his attitude toward the plaintiff.[4]

IX. EVIDENCE.

§ 88. In General. — Evidence relating to particular grounds for divorce has in some instances been heretofore discussed in connection with the ground itself:[5] It is proposed in this subdivision to note certain general principles of evidence which are applicable to divorce actions generally. The rules governing the admissibility and the weight and sufficiency of evidence in civil actions gen-

wherein the husband by cross-complaint asked for a divorce on the ground of extreme cruelty, the court sufficiently found on the issue as to whether the wife had circulated false reports about the husband and his daughter-in-law, in finding that the wife did not accuse the husband of improper relations with his daughter-in-law, and that no acts or statements of the wife had brought the husband into contempt with all or any of his friends, and that no act or statement of the wife had brought the previous good reputation of the husband into disrepute.

2. Polakoff v. Polakoff, 34 Cal. App. Dec. 492, 196 Pac. 778.

3. Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298. See supra, § 26.

4. Brewthauer v. Brewthauer, 45 Cal. App. 759, 188 Pac. 296.

5. See for example, supra, §§ 17–20, as to evidence of adultery.

erally are applicable to divorce actions,[6] with certain exceptions hereinafter noted.[7] As in other civil actions,[8] the plaintiff need prove his case only by a fair preponderance of evidence; and this rule is applicable to a charge of adultery on the part of the defendant.[9] Evidence showing a husband's relations with another woman is material, relevant and competent in support of a charge of cruelty,[10] or desertion.[11] The plaintiff in an action for divorce on the ground of extreme cruelty cannot state her conclusion as to the meaning the defendant intended to convey by certain statements made to her. The determination of their meaning is for the trial court.[12]

§ 89. **Necessity for Proof.**—Because of the public interest in the marriage relation and the maintenance of its integrity, as the foundation of the social system, the law wisely requires proof of the facts alleged as the ground for its dissolution.[13] The rule in this regard is declared in the Civil Code in the following language:

"No divorce can be granted upon the default of the defendant or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers."[14]

This statute is merely affirmatory of the well-established rule of the common and of the English ecclesiastical law,

6. See EVIDENCE.

7. See infra, §§ 89, 94.

8. See EVIDENCE.

9. Koenigstein v. Koenigstein, 35 Cal. App. Dec. 762, 200 Pac. 730 (citing Hartshorn v. Hartshorn (Okl.), 168 Pac. 822); 9 Ruling Case Law, 328.

10. Klemmer v. Klemmer, 42 Cal. App. 618, 187 Pac. 85 (husband's petition seeking to take under will of another woman in his favor, stating him to be her fiancé).

11. Sweasey v. Sweasey, 126 Cal. 123, 58 Pac. 456.

12. Robinson v. Robinson, 159 Cal. 203, 113 Pac. 155.

13. Baker v. Baker, 13 Cal. 87; Id., 13 Cal. 106.

14. Civ. Code, § 130.

which has been recognized from the earliest period, both in England and the several states of the Union. The object of the rule is to prevent the obtaining of a divorce by collusion between the parties where no legal ground therefor exists.[15] Its effect necessarily is to make it erroneous for a court to grant a divorce in the absence of some proof, independent of the admissions and statements of the parties, of the facts warranting such action. And a party appealing from a judgment of divorce may successfully urge such error as a ground for reversal.[16] While in the ordinary case it would be a complete answer to any suggestion of error warranting reversal on the ground that there had been no actual proof, that the facts had been admitted by the parties, this is not so in divorce cases which are sui generis.[17]

The whole issue in divorce cases cannot, even by stipulation of parties, be referred; and where a reference is had, the referee cannot pass upon the testimony.[18] If he makes any statement or finding of facts, the court is obliged to disregard them, and base its decree only upon the legal testimony taken.[19-20] The referee in such cases is simply a master to take testimony.

§ 90. **Proof of Marriage Relation.**—To warrant a decree of divorce it is essential that the marriage relation exist between the parties upon whom the decree may operate,

15. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Baker v. Baker, 13 Cal. 87; Crum v. Crum, 38 Cal. App. Dec. 89, 207 Pac. 506; Blanchard v. Blanchard, 10 Cal. App. 203, 101 Pac. 536.

16. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Bennett v. Bennett, 28 Cal. 599.

17. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837.

18. Baker v. Baker, 10 Cal. 527.

19-20. Benkert v. Benkert, 32 Cal. 467 (construing act of 1857, concerning divorces, and holding that a finding of a court commissioner is included within the spirit and meaning of the prohibition); Baker v. Baker, 10 Cal. 527 (construing Sessions Laws of 1857, 240).

and the burden of proving the existence of such relation, if put in issue, is upon the complaining party.[1] The failure to deny the averment of marriage is an admission of its truth and obviates proof thereof.[2] If no question of a public offense is involved, a marriage may be proved by evidence of cohabitation and repute and the presumption arising therefrom. The exception in case of a public offense proceeds upon the ground that the presumption of marriage, without proof of actual marriage, cannot overcome the stronger presumption of innocence.[3] If it appears that after the cohabitation the defendant had married another person, such evidence is inadmissible and is insufficient to prove marriage as its effect is to prove him guilty of bigamy.[4] This does not apply, however, where he is charged with adultery, mere adultery being no public offense.[5] Proof of solemnization of marriage between the parties, aided by the presumption that the solemnization was regular, is sufficient to overcome any presumption of bigamy from mere evidence that the plaintiff had been previously married to another husband, who was still living at the time of the marriage to the defendant. In such case, the burden is upon the defendant to show clearly the illegality of the marriage solemnized between them, by proof that there had been no divorce of the plaintiff from

1. McKibben v. McKibben, 139 Cal. 448, 73 Pac. 143; Hite v. Hite, 124 Cal. 389, 71 Am. St. Rep. 82, 45 L. R. A. 793, 57 Pac. 227. See Smith v. Smith, 163 Cal. 630, 126 Pac. 475 (holding evidence, although to a certain extent conflicting, sufficient to sustain a finding that the parties had never been husband and wife). As to necessity for proof of marriage as a condition to the granting of alimony, see ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 969.

2. Fox v. Fox, 25 Cal. 587; Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304.

3. White v. White, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276 (declaring that the statement of the rule in People v. Anderson, 26 Cal. 129, as regards actions for divorce, is a mere dictum, outside of the case, and is not sustained by the decided cases or by the law); Case v. Case, 17 Cal. 598. See MARRIAGE, as to proof of marriage generally.

4. Case v. Case, 17 Cal. 598.

5. White v. White, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276.

the former husband at that time.[6] If a plaintiff proves an actual marriage between himself and the defendant, evidence that the defendant had married the person with whom he is charged to have committed adultery is irrelevant.[7]

§ 91. Proof of Residence.—Residence for the prescribed period being essential to the jurisdiction of a court to grant a divorce[8] must be proved, under section 130 of the Civil Code, even though it is admitted in the pleadings,[9] or on the trial. And the court cannot act upon the uncorroborated statement, admission or testimony of the parties.[10] However, in the absence of evidence to the contrary, the testimony of the plaintiff as to his residence is sufficiently corroborated by the evidence of witnesses who testify as to his reputation, sobriety and industry and his personal habits, where such evidence strongly tends to strengthen and confirm the statements of the plaintiff in regard to such residence, and indicates that he had been a resident of such county for many years preceding the action.[11]

§ 92. Declarations and Admissions.—Section 130 of the Civil Code, which provides that a divorce shall not be granted upon the statements or admissions of the parties, requires other proof of the facts alleged, but does not prohibit such admissions from being given in evidence in con-

6. McKibben v. McKibben, 137 Cal. 448, 73 Pac. 143, holding that where the judgment-roll in a prior action for divorce brought by the former husband against the plaintiff offered in evidence showed personal service of an alias summons upon her, it must be presumed that the court in rendering judgment of divorce against her had evidence of such personal service before it; and it is immaterial that the court excluded an affidavit for the publication of the original summons, upon objection of plaintiff.

7. Kilburn v. Kilburn, 89 Cal. 46, 26 Pac. 636.

8. See supra, § 62.

9. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; Bennett v. Bennett, 28 Cal. 599; Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362.

10. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837.

11. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234.

nection with other proofs.[12] When all presumptions of collusion are repelled, and, from circumstances, it appears reasonably certain that the confession made is true, the ground of the rule of exclusion in cases of divorce is obviated, and there can be no reason for refusing consideration to the confession of a party.[13]

Statements and complaints made by the plaintiff to third persons concerning the conduct of the defendant are self-serving and hearsay, and are ordinarily inadmissible in his behalf,[14] unless they are made under such circumstances that they may be said to be a part of the res gestae, or unless they are made in the presence of the defendant, in which case they are admissible in connection with his conduct and declarations in response thereto, as admissions by him.[15] So also when they are repeated by the third person to the defendant, they are admissible in connection with his conduct in response thereto in which case they constitute part of the plaintiff's testimony as to cruelty.[16]

§ 93. Declarations to and Testimony of Physicians.—Statements of a plaintiff made to her physician regarding her husband's treatment of her as affecting the happiness or unhappiness of her married life are not the less hearsay and self-serving declarations when made to him than when made to any other person not a physician. They are not part of the res gestae, and where they are

12. Evans v. Evans, 41 Cal. 103, construing act of 1851, concerning divorces, § 8; Baker v. Baker, 13 Cal. 87 (construing same act).

13. Evans v. Evans, 41 Cal. 103; Baker v. Baker, 13 Cal. 87, per Field, J.

14. Turner v. Turner, 63 Cal. Dec. 1, 203 Pac. 109; Robinson v. Robinson, 159 Cal. 203, 113 Pac. 155. See infra, § 93.

15. Rose v. Rose, 112 Cal. 341, 44 Pac. 658.

16. Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499. While in Turner v. Turner, 63 Cal. Dec. 1, 203 Pac. 109, it is stated that these statements in the Venzke case were admissible as part of the res gestae, being made immediately after the transaction, it would seem that they were not admissible on that theory, because merely narrative statements, but that they were admissible in connection with the defendant's conduct, as stated in the text, as being admissions by him.

not necessary to enable the physician to determine the nature of her malady, such statements are incompetent.[17] However, a physician may testify to facts learned from an objective examination of the plaintiff[18] or while treating her, and such evidence may constitute a sufficient corroboration of the plaintiff's testimony as to an alleged act of cruelty.[19] And it has been held that a physician of the plaintiff may testify generally as to the subject to which plaintiff ascribed her disturbance of mind and health when she consulted him. Such testimony may, in a general though perhaps not in a strict sense, be classed as part of the res gestae.[20] Licensed physicians cannot, of course, be examined without the consent of their patients, as to any information acquired in attending the patients.[1]

§ 94. Corroboration.—Under section 130 of the Civil Code,[2] no divorce can be granted "upon the uncorroborated statement, admission, or testimony of the parties."[3] This section applies only to actions for divorce, and even

17. Turner v. Turner, 63 Cal. Dec. 1, 203 Pac. 109; Hubbell v. Hubbell, 7 Cal. App. 661, 95 Pac. 664.

18. Turner v. Turner, 63 Cal. Dec. 1, 203 Pac. 109.

19. Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499.

20. Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483, holding that such evidence is admitted as corroborative in its tendency.

1. Code Civ. Proc., § 1881. See EVIDENCE. Valensin v. Valensin, 73 Cal. 106, 14 Pac. 397, holding that a hypothetical question as to the effect which would probably result to the plaintiff, in the condition in which he found her, from the acts of the defendant, which constituted the alleged cruelty, does not concern a privileged matter.

2. See supra, § 89.

3. Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443; Borden v. Borden, 166 Cal. 469, 137 Pac. 27; Berry v. Berry, 145 Cal. 784, 79 Pac. 531 (stating that doubts should be resolved against divorce, instead of for it); Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19; Kuhl v. Kuhl, 124 Cal. 57, 56 Pac. 629; Reid v. Reid, 112 Cal. 274, 44 Pac. 564; Cooper v. Cooper, 88 Cal. 45, 25 Pac. 1062; McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61; Johnson v. Superior Court, 63 Cal. 578; Lisenbee v. Lisenbee, 42 Cal. App. 567, 183 Pac. 862; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Goldsmith v. Goldsmith, 26 Cal. App. 458, 147 Pac. 214.

in such actions only to the granting of the divorce.[4] In addition to the general provision requiring corroboration in divorce actions generally, the code contains an additional section relating to adultery, which is as follows:

"In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce."[5]

It has been held, however, that when a plaintiff alleges cruelty and the defendant pleads desertion by the plaintiff by way of cross-action, the court, while unable to grant a divorce on the ground of extreme cruelty of the defendant upon the uncorroborated testimony of the plaintiff,[6] is not under such restraint when considering whether the leaving of the defendant by the plaintiff constituted willful desertion, or was justified by his cruel treatment.[7]

§ 95. **Sufficiency of Corroboration.**—The statute requiring corroboration in divorce actions does not specify the extent to which corroboration must go, and, indeed, in the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite.[8] It evidently is not necessary that the plaintiff's testimony be corroborated as to every

4. Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443; Koenigstein v. Koenigstein, 35 Cal. App. Dec. 762, 200 Pac. 730 (holding that the provisions requiring corroboration do not apply in actions for separate maintenance).

5. Code Civ. Proc., § 2079. Goldsmith v. Goldsmith, 26 Cal. App. 458, 147 Pac. 214.

6. See infra, § 96.

7. White v. White, 86 Cal. 219, 24 Pac. 996.

8. Brautigam v. Brautigam, 181 Cal. 157, 183 Pac. 529; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Andrews v. Andrews, 129 Cal. 184, 52 Pac. 298; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037; Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499; Cooper v. Cooper, 88 Cal. 45, 25 Pac. 1062; Evans v. Evans, 41 Cal. 103, per Crockett, J.; Crum v. Crum, 38 Cal. App. Dec. 89, 207 Pac. 506; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425 (corroboration of husband's testimony of the admission on the part of the wife as to a self-inflicted abortion held sufficient); Blanchard v. Blanchard, 10 Cal. App. 203, 101 Pac. 536.

fact and circumstance testified to. It is enough if there be corroboration as to some fact or facts which is or are sufficient to support the action and justify the entry of a decree in favor of the complaining party.[9] The purpose of the statute is mainly to prevent collusion,[10] and it is clear that the testimony of one spouse cannot be accepted as sufficient corroboration of the testimony of the other for the purpose of making a cause of divorce for either. There must be evidence in support of the cause of action upon which a divorce is granted, in addition to the evidence of either or both of the parties to the action.[11] However, it is doubtful if any lesser degree and quantity of corroboration is required where the case is devoid of any suspicion of collusion.[12] And a court certainly would not be justified in granting a divorce whenever it is satisfied that there is no collusion and that the allegations of the complaint are true.[13]

§ 96. **Corroboration of Charge of Cruelty.**—Where the cruelty consists of successive acts, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff; but it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or if there is other evidence, circumstantial or direct, which

9. Cooper v. Cooper, 88 Cal. 45, 25 Pac. 1062; Matthai v. Matthai, 49 Cal. 90.

10. See supra, § 89.

11. Stedman v. Stedman, 179 Cal. 288, 176 Pac. 437; Lemberger v. Lemberger, 36 Cal. App. Dec. 721, 63 Am. Dec. 94, 203 Pac. 786 (opinion of supreme court in bank denying hearing). But see Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183 (containing an expression to the contrary which, in view of the later case, must be deemed to be overruled). Also, see Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499, where it is said that the defendant's letter to the plaintiff tended to corroborate her testimony as to his having charged her with adultery.

12. Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402 (opinion of supreme court denying hearing).

13. Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037.

strongly tends to strengthen and confirm the statements of the plaintiff.[14]

While incompatibility of temperament furnishes no ground for divorce in California, it may properly be taken into consideration as explaining the course of conduct of defendant.[15] And taken into consideration for that purpose, it may afford a reasonable explanation not only of defendant's general course of conduct toward the plaintiff, as testified to by herself, but as a circumstance tending to corroborate and confirm the charges made by plaintiff as constituting his general course of conduct toward her, even as to those testified to by plaintiff alone.[16] This may be true though the acts thus corroborated are not of

14. Percy v. Percy, 63 Cal. Dec. 596, 207 Pac. 369; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037 (holding that where the testimony of the plaintiff, in an action for divorce upon the ground of extreme cruelty, is sufficiently corroborated as to certain acts and declarations sufficient to constitute extreme cruelty, it is not material or necessary that her testimony should have been corroborated as to all other distinct acts of cruelty alleged in the complaint); Cooper v. Cooper, 88 Cal. 15, 25 Pac. 1062 (holding that where the defendant is charged with many acts of extreme cruelty extending through a period of years, the testimony of plaintiff as to a course of extreme cruelty on the part of the defendant, is sufficiently corroborated by proof of one of the acts of cruelty alleged in the complaint and evidence of defendant's admissions of cruelty to another witness); Matthai v. Matthai, 49 Cal. 90; Crum v. Crum, 38 Cal. App. Dec. 89, 207 Pac. 506; Dahnke v. Dahnke, 36 Cal. App. Dec. 587, 202 Pac. 894; Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483 (holding it to be prejudicial error to refuse to permit the plaintiff, while being examined by her own counsel, to testify as to the acts of the defendant at the times he would intrude himself upon her privacy, on the ground that the witness should not be embarrassed as to matters that could not be corroborated, and that such testimony would be of no value and disregarded by the court); Cargnani v. Cargnani, 16 Cal. App. 96, 116 Pac. 306 (holding that where the plaintiff's corroborative evidence was as to acts of cruelty not averred, yet where no objection thereto on account of variance was urged at the trial, it cannot be urged upon appeal for the first time).

15. See supra, § 29.

16. Avery v. Avery, 148 Cal. 244, 82 Pac. 967; Blanchard v. Blanchard, 10 Cal. App. 203, 101 Pac. 536.

themselves sufficient to justify a divorce.[17] The testimony of a wife that her husband frequently spoke harshly to her and that she believed her life to be in danger, is sufficiently corroborated by the testimony of another witness to the same effect, notwithstanding the latter further testified that he had never personally seen the husband in a mood to hurt anyone.[18] While a letter written by the defendant to the plaintiff may tend to corroborate testimony that he charged her with adultery,[19] evidence of plaintiff's attorney who attempted to settle the matters between the parties as to statements made by the defendant in conversations of a friendly and confidential character will not have that effect.[20] The testimony of a wife that she had a loathsome disease, said to have been communicated to her by her husband, is sufficiently corroborated by the testimony of a physician that he had treated her for it.[1]

It is not essential that there should be any corroboration of the plaintiff's testimony as to the mental suffering entailed upon him by reason of the acts of the defendant, other than such corroboration as is afforded by the evidence showing the nature and circumstances of the acts,

17. Blanchard v. Blanchard, 10 Cal. App. 203, 101 Pac. 536, holding that, although there is no direct corroboration of the testimony of plaintiff as to the specific acts of cruelty charged, yet where incompatibility of temperament appears, and the mutual confidence and affection essential to conjugal happiness and the proper maintenance of the marriage state seems to have been entirely wanting, and the corroboration shows an "austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, and sallies of passion" on the part of the husband, and that his general conduct was such as to render the plaintiff's life miserable and unendurable, it is sufficient even though the acts thus corroborated are not of themselves sufficient to justify a divorce.

18. Grierson v. Grierson, 156 Cal. 434, 134 Am. St. Rep. 137, 105 Pac. 120.

19. Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499. See Cooper v. Cooper, 88 Cal. 45, 25 Pac. 1062, holding a complaint in a prior divorce suit containing unjust charges against the plaintiff is corroborative of her testimony as to such charges.

20. Haley v. Haley, 67 Cal. 24, 7 Pac. 3.

1. Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499.

considered in the light of all the circumstances of the case, including the character, temperament and disposition of the parties.[2] Indeed, it does not seem that any corroboration can ordinarily be had.[3] In any event, a court undoubtedly has the right to draw reasonable inferences from the nature of the false charges made or acts done, the circumstances under which they were made or done, the publicity given them, and the other circumstances of the case and the parties, as to the effect of the charges or acts upon the mind of the party against whom they are directed, and if such reasonable inferences are in accord with the party's own testimony as to his mental suffering there is sufficient corroboration to satisfy the requirements of the law, if corroboration in such a matter is essential.[4]

§ 97. Corroboration of Charge of Desertion.—A divorce cannot be granted for desertion upon the uncorroborated testimony of the plaintiff.[5] But it has been held that the attitude of the defendant in refusing a reconciliation, or to cohabit with the plaintiff under any circumstances, and the declarations of the defendant to third parties at the time of and subsequent to the offer of reconciliation, are a sufficient corroboration within the rule.[6] While the secrets of the bedchamber are very frequently hard to substantiate by other witnesses than the parties

2. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927 (stating that Haley v. Haley, 67 Cal. 24, 7 Pac. 3, does not hold otherwise, although there are several expressions in the opinion tending to support a contrary view); Haley v. Haley, 2 Cal. Unrep. 761, 14 Pac. 92.

3. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927.

4. MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927, per Angellotti, J.; Haley v. Haley, 2 Cal. Unrep. 761, 14 Pac. 92 (reversed on another point in De Haley v. Haley, 74 Cal. 489, 5 Am. St. Rep. 460, 16 Pac. 248, but the holding set out in the text was approved in MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927).

5. Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037. And see to same effect, Borden v. Borden, 166 Cal. 469, 137 Pac. 27.

6. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

themselves, nevertheless the parties to an action for divorce on the ground of desertion based upon persistent refusal to have reasonable matrimonial intercourse, are not thereby relieved from the necessity of complying with the mandate of the law respecting corroboration.[7] And it has been held that the testimony of a third party that the husband and wife, though living in the same house, occupied separate bedrooms, was not of the character and degree required by the code.[8] Corroboration is also required of testimony of a party that, during the period of persistent refusal of intercourse, health and physical condition did not make such refusal reasonably necessary. While it is, no doubt, difficult to corroborate testimony of a party regarding these matters, such is the burden to be sustained when one relies upon this cause of divorce.[9] And as has already been pointed out, the testimony of one spouse cannot be taken in corroboration of that of the other for the purpose of proving a cause of divorce.[10]

X. JUDGMENT OR DECREE.

General Principles.

§ 98. In General — Discretion of Court — Provisional Remedies.—It is fundamental that there can be no divorce

7. Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234, per Waste, P. J.

8. Lemberger v. Lemberger, 36 Cal. App. Dec. 721, 63 Cal. Dec. 94, 203 Pac. 786; Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234.

9. Lemberger v. Lemberger, 36 Cal. App. Dec. 721, 63 Cal. Dec. 94, 203 Pac. 786, per Langdon, J.

10. Lemberger v. Lemberger, 36 Cal. App. Dec. 721, 63 Cal. Dec. 94, 203 Pac. 786 (opinion of supreme court in bank denying hearing); Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19, holding that evidence that the defendant admitted while on their wedding trip that there had been no matrimonial intercourse between her and her husband, without any statement as to whether the refusal was reasonably necessary, and without any corroboration of her confession, is not sufficient to prove desertion by her. The confession of the wife, as well as the testimony of the husband, requires corroboration, see supra, § 95.

unless there has been a valid marriage. Consequently, if it should appear that at the time of the commencement of the action the parties were not husband and wife a decree of divorce will be denied.[11] The court has no arbitrary power to grant or refuse the relief.[12] Although the statute provides that the court "may" grant a divorce, it has no discretion to deny relief when a case therefor is made out.[13]

Provisional remedies.—Provisional remedies in divorce cases are a matter of statutory regulation.[14] And a court has no authority to make, pending a divorce action, an order not authorized by statute. It cannot, for example, make an order excluding the defendant from his residence pending the hearing of the case, there being no statutory authority therefor.[15]

§ 99. Default Judgments Generally.—In the ordinary case, if the defendant defaults, a judgment may be taken against him without requiring proof of the facts necessary to establish the plaintiff's case.[16] The legislature, however, has made a distinction between divorce and other cases, by declaring that no divorce can be granted upon the mere default of the defendant, but the court shall in

11. McCormack v. McCormack, 175 Cal. 292, 165 Pac. 930; Smith v. Smith, 163 Cal. 630, 126 Pac. 475; Harron v. Harron, 128 Cal. 308, 60 Pac. 932; Holt v. Holt, 107 Cal. 258, 40 Pac. 390; Kilburn v. Kilburn, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636; Sharon v. Sharon, 84 Cal. 424, 23 Pac. 1100; Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1142; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Coulthurst v. Coulthurst, 58 Cal. 239.

12. Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367.

13. Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367; Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 Pac. 853; Lowman v. Lowman, 165 Cal. 352, 132 Pac. 439; Benkert v. Benkert, 32 Cal. 467. See supra, § 14.

14. Civ. Code, §§ 136–148; Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; Luitwieler v. Luitwieler, 38 Cal. App. Dec. 244, 107 Pac. 931.

15. Luitwieler v. Luitwieler, 38 Cal. App. Dec. 244, 207 Pac. 931.

16. See JUDGMENTS.

all cases require proof of the facts alleged.[17] Hence the default of the defendant amounts to very little as regards the plaintiff's recovery of a judgment or decree of divorce. The interest of the public in divorce cases is such that the courts proceed with practically the same formality as though the action were being contested by the defendant and do not grant a divorce unless the plaintiff's proof shows that he or she is entitled thereto.[18] But the effect of the provision is not to raise "issues of fact," nor to constitute the taking of proof submitted by the plaintiff in cases where the defendant has not answered a "trial" as those terms are used in the provisions relating to new trials. Such an issue arises only where a material averment of fact is made on the one side and is controverted upon the other.[19] The fact that a judgment was rendered upon default before the time allowed the defendant to answer has expired renders the judgment erroneous merely and not void, and it can be attacked only upon motion or by appeal, and by the parties in interest.[20]

§ 100. Relief Under Section 473, Code of Civil Procedure. When a decree is taken against a defendant in a divorce action through his mistake, inadvertence, surprise or excusable neglect, or when from any cause the summons has not been served on the defendant, he may move under section 473 of the Code of Civil Procedure to be relieved therefrom.[1] The rules of practice under this section ap-

17. Civ. Code, § 130; Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367; Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Johnson v. Superior Court, 63 Cal. 578. See supra, § 89.

18. Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367.

19. Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122. See supra, § 83.

20. In re Newman's Estate, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887.

1. See Storke v. Storke, 116 Cal. 47, 47 Pac. 869, 48 Pac. 121, decided prior to the statute providing for interlocutory decrees and holding that after the court has rendered judgment in favor of the plaintiff upon the issues presented in a case, and such judgment has been entered

plicable to divorce actions differ in many respects from those governing other actions. In the first place, it is not necessary for the defendant seeking relief from a default in a divorce action to present an affidavit of merits.[2] In the next place, the principle of public policy which requires that no divorce shall be granted except for good cause and after full hearing, has largely entered into the formulation by the courts of a more liberal rule to be applied in relieving from default in divorce cases than applies in cases where property rights alone are involved.[3]

in the records of the court, it cannot be vacated or set aside except by such proceedings as would authorize a court to vacate or set aside a judgment in any other action. The plaintiff has thereby acquired a right of which he can be divested only in the mode provided by law.

As to proceedings under section 473 of the Code of Civil Procedure generally, see JUDGMENTS.

2. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020; Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621 (holding, however, that an affidavit of merits if filed may serve the purpose of an answer); Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531 (holding further that an order vacating a default is not erroneous, because no affidavits were made or used, if the bill of exceptions shows a ground upon which the court might properly exercise its discretion in vacating the judgment); McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61.

3. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020; Smith v. Smith, 145 Cal. 615, 79 Pac. 275. And see Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621 (holding that a judgment by default in an action for divorce on the ground of adultery, awarding the husband the four minor children, three of whom are girls, the eldest being about eight years old, and assigning to him all of the community property, is a harsh judgment, and that it is error for the court to refuse to set it aside upon an application therefor by the wife, where her affidavit denies specifically the material allegations of the complaint, and states facts showing either collusion between the parties, or that the wife was grossly misled and deceived by her husband as to the ground of the proposed action, he having informed her that it would be brought on the ground of desertion); Cohn v. Cohn, 85 Cal. 108, 24 Pac. 659 (holding that where it appears that alleged acts of extreme cruelty on the part of the wife toward her husband were the result of a diseased mind, culminating in her insanity and that she was insane at the date of service of summons upon her and was judicially declared insane within one month after a decree of divorce was granted to the husband, upon her default, it was held to be the duty of the court to set aside the decree upon motion of her guardian, and to allow an answer to the complaint to be filed); Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531

It should be the aim of the court to afford the fullest possible hearing in such matters.[4] The court should be very liberal in granting applications to set aside defaults where it appears at all probable that there was no service, either personal or by publication,[5] or where there seems to have been an honest desire on the part of the defendant to present his side of the case, even though the neglect shown might be sufficient to deprive him of that right in an ordinary action.[6] As in other cases, the application is addressed to the sound legal discretion of the court, and its action in granting or denying it will not be disturbed on appeal unless a clear abuse of such discretion is shown.[7]

(holding that while the different departments of the superior court of San Francisco constitute, theoretically, one court, still, practically, for the purposes of the trial of causes, they are distinct as other superior courts, and to transfer a cause from one department to another, and try it on the same day, without notice, is an abrupt proceeding, from which, at least in a divorce case, it is proper to relieve the absent party).

4. McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61, per Paterson, J.

5. McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61, holding that when the affidavit of defendant upon such application shows that she was not a resident of the state within six months before suit, and that her first notice of the suit was a copy of the decree of divorce sent her by mail in the handwriting of the plaintiff, and the counter-affidavits for plaintiff contain improbable statements as to personal service of the summons upon the defendant out of the state, the judgment should be set aside, with leave to answer within a reasonable time.

6. Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648.

7. McDonald v. McDonald, 173 Cal. 175, 159 Pac. 426; Morton v. Morton, 117 Cal. 443, 49 Pac. 557; Anderson v. Anderson, 37 Cal. App. Dec. 96, 204 Pac. 426. See Sather v. Sather, 37 Cal. App. Dec. 619, 206 Pac. 476 (holding affidavit on application to open default decree on the ground that defendant's failure to answer resulted from her fear of plaintiff arising from his misconduct, insufficient under Code Civ. Proc., § 473, to justify setting aside the default); Archibald v. Archibald, 32 Cal. App. Dec. 997, 192 Pac. 322, holding that where the court found that the plaintiff's testimony was not sufficiently corroborated and denied a divorce, a statement of the court that if the plaintiff enlisted in the army and was able to bring in corroborating testimony that the decree would be without prejudice to a new action, and that the court would hear him, does not show an abuse of discretion on the part of the court in refusing to set aside the decree for the purpose of hearing further

Where the evidence adduced on such an application is conflicting, it is not an abuse of discretion to deny the motion.[8]

Although ordinarily the ground that the cause was not at issue at the time an interlocutory judgment was rendered is not sufficient to warrant the court in setting aside an interlocutory judgment, yet the court has a right to take into consideration, in passing upon the motion to vacate it, the fact that there was an unanswered cross-complaint of defendant on file containing allegations which, if true, should prevent the plaintiff from obtaining a divorce.[9] It has been held that the failure of a wife to contest an action resulting in an interlocutory judgment against her, due to fear engendered in her by the representations made to her by her husband and her own attorney that if she did defend, her infant child would be taken from her and its father and placed in some public institution, is excusable neglect, within the meaning of the code section.[10]

Time to make motion.—The time for making a motion to vacate a decree of divorce under the provisions of said section 473 runs from the date of its entry.[11] It has been held that an application to vacate the default of the defendant and to set aside an interlocutory judgment is made in time, where the notice of motion, with affidavits

evidence under the provisions of the section.

8. Morton v. Morton, 117 Cal. 443, 49 Pac. 557; Anderson v. Anderson, 37 Cal. App. Dec. 96, 204 Pac. 426.

9. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020.

10. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020, holding further that in such an action, where the wife's original answer traversing the complaint was superseded by an amended answer, which admitted all of the allegations of the complaint and raised no issue of fact, her remedy was by motion for relief under the section referred to, and not by motion for a new trial. The latter remedy is available only where issues of fact have been raised and tried; see supra, § 83.

11. Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488; Claudis v. Melvin, 146 Cal. 257, 79 Pac. 897; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; Andreen v. Andreen, 15 Cal. App. 728, 115 Pac. 761; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897.

and a copy of the proposed answer, was served and filed, and the motion noticed for a date within six months from the entry of the default and judgment, although the hearing was continued by consent of the parties to a time beyond the six-months' period.[12] If the motion is made after the expiration of the statutory period, it may be denied.[13]

§ 101. Relief from Fraudulent Decrees.—If a judgment of divorce is obtained by fraud it may be set aside on motion of a party[14] made in the original case within a reasonable time,[15] or by the court on its own motion,[16] or the party may have relief therefrom in an equitable action; but the judgment is not subject to collateral attack upon this ground.[17] An action for equitable relief against the judgment may be brought in the superior court, or, if the necessary jurisdictional facts exist, in a federal court.[18] The fraud against which relief may be had in such action is extrinsic fraud.[19] Thus, relief may be granted where it appears that the plaintiff had made a

12. Bettencourt v. Superior Court, 32 Cal. App. 607, 163 Pac. 682.

13. Andreen v. Andreen, 15 Cal. App. 728, 115 Pac. 761.

14. Estate of McNeil, 155 Cal. 333, 100 Pac. 1086.

15. Stierlen v. Stierlen, 18 Cal. App. 609, 124 Pac. 226, holding a void judgment is not governed by section 473 of the Code of Civil Procedure.

16. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020, stating the court has inherent power to set aside the judgment for fraud practiced upon the court and citing numerous cases from other jurisdictions.

17. Estate of McNeil, 155 Cal. 333, 100 Pac. 1086; Elliott v. Wohlfrom, 55 Cal. 384, holding that a decree of divorce rendered in favor of a husband in a case where the wife appeared by attorney, but the appearance of the attorney was secured by the fraud of the husband and without the knowledge or consent of the wife, is not void, but, at most, only voidable at her instance, and cannot be attacked collaterally by the husband or his grantee. See note, 3 A. L. R. 540. See JUDGMENTS, as to relief from judgments generally.

18. McNeil v. McNeil, 78 Fed. 834.

19. Stone v. Stone, 38 Cal. App. Dec. 534, 208 Pac. 993 (holding that an alleged fraudulent allegation that there was no community property constitutes intrinsic and not extrinsic fraud and is not ground for an attack upon a judgment of divorce in a collateral action).

knowingly false declaration as to the residence of the defendant, in consequence of which process was sent to the defendant by mail to a state not that of her residence, instead of to her true address,[20] or where a husband who had been appointed guardian of his wife was guilty of fraud in not calling to the attention of the court the fact that he was suing his ward, and that his ward was an incompetent person on whom a summons might not be legally served.[1] The plaintiff in such action should not be guilty of laches.[2] The fact that the plaintiff joins as codefendant a person subsequently married by the former spouse and seeks to recover of both the damages sustained does not render the complaint objectionable on the ground of misjoinder of causes of action.[3]

§ 102. **Relief from Collusive Decrees.**—It has been intimated that the superior court, in a proceeding under section 473 of the Code of Civil Procedure, may set aside a judgment of divorce on the ground of collusion without a showing of mistake, inadvertence, surprise or excusable neglect.[4] However this may be, it is settled that a court of equity will not interfere to relieve a party to an action from a judgment which has been procured through a collusive agreement between the parties to the effect that

20. Brandt v. Brandt, 178 Cal. 548, 174 Pac. 55.

1. Williams v. Williams, 37 Cal. App. Dec. 603, 206 Pac. 650.

2. Prewett v. Dyer, 107 Cal. 154, 40 Pac. 105; Williams v. Williams, 37 Cal. App. Dec. 603, 206 Pac. 650 (holding that where the wife did not learn of the divorce decree until more than two years after it was entered and brought her suit to annul it within one month after learning thereof, she was not guilty of laches which barred her right to have it set aside for fraud); McNeil v. McNeil, 78 Fed. 834, per McKenna, Circuit Judge (holding that a delay of eighteen months may be such laches as precludes an independent suit to set aside a judgment on the ground of fraud). See EQUITY, as to laches generally.

3. Williams v. Williams, 37 Cal. App. Dec. 603, 206 Pac. 650.

4. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020; Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621. Distinguished in Bancroft v. Bancroft, 178 Cal. 359, 173 Pac. 579. However, Shaw, J., specially concurring in this case, doubted the power of the court to grant relief under section 473 of the Code of Civil Procedure under such circumstances.

either of said parties shall commence the action and obtain, by the connivance or consent of the other, a judgment to which he would not otherwise be entitled. And this rule[5] prevails in divorce as in other cases. Even though the alleged cruelty of the husband was such as to amount to coercion by which the plaintiff was induced to enter into an oral agreement to procure a collusive divorce, the wife is not entitled to relief where the coercion could not have acted upon her when she was represented by counsel, as she must have been to carry the prohibited bargain into effect.[6]

§ 103. Collateral Attack.—In accord with the general rules, a judgment of divorce which is not void upon its face cannot be impeached collaterally for errors of law or irregularities in practice.[7] It cannot be so attacked

5. Bancroft v. Bancroft, 178 Cal. 359, 173 Pac. 579, citing Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736; Fealey v. Fealey, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537; Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954. Civ. Code, §§ 3515, 3517, 3524. And see JUDGMENTS.

6. Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954.

7. Estate of McNeil, 155 Cal. 333, 100 Pac. 1068 (holding that although Code Civ. Proc., § 412, requires it to appear, either by an affidavit for publication or by the verified complaint, that a cause of action existed to secure jurisdiction of the person of the defendant by the publication of summons, yet if, when an action for divorce was determined, neither the affidavit nor the order for publication of summons constituted any part of the judgment-roll, they cannot, upon collateral attack upon the judgment, be examined; and if the divorce complaint failed to state a cause of action, it must be conclusively presumed that the affidavit for publication stated a cause of action, and that an order for publication was lawfully made thereon); In re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887 (to the same effect); Gimmey v. Liese, 1 Cal. Unrep. 353, holding that the question as to whether a judgment was erroneous or regular, or whether the relief afforded was within the power of the court to grant, cannot be raised in a separate proceeding, after the divorce judgment has been affirmed on appeal. See note, 3 A. L. R. 540, as to collateral attack on divorce decree by party at whose instance it is entered.

because of defects in the complaint,[8] or because of fraud,[9] or because there was a former action pending at the time of the institution of the action in which it was rendered; and evidence is inadmissible to impeach a divorce judgment collaterally, either by proof that plaintiff had not in fact, as alleged in his complaint, been a resident of California for one year next preceding the commencement of the action, or by proof that the decree was obtained by fraud and conspiracy on the part of the husband and the woman whom he subsequently married.[10] Without conceding that a decree is void on its face and therefore subject to collateral attack unless it affirmatively shows jurisdiction, it has been held that a decree which recites that all allegations of the complaint were sustained by testimony affirmatively shows jurisdiction, where the complaint avers a residence of the plaintiff in the state during her whole life, and in the county for eighteen months last past.[11]

§ 104. Res Adjudicata.—It is fundamental in judicial practice that parties can litigate to judgment the same thing but once.[11a] The consequence whereof is that after a divorce suit has terminated in favor of either the plaintiff or the defendant, no second suit can be brought to try anew anything within the scope of the first one, whether in fact it was considered therein or not.[12] Likewise,

8. Estate of McNeil, 155 Cal. 333, 100 Pac. 1068; In re James, 99 Cal. 374, 37 Am. St. Rep. 60, 39 Pac. 1122; McNeil v. McNeil, 78 Fed. 834.

9. See supra, § 101.

10. Estate of McNeil, 155 Cal. 333, 100 Pac. 1068.

11. Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466.

11a. See JUDGMENTS.

12. Krzepicki v. Krzepicki, 167 Cal. 449, 140 Pac. 13; Greer v. Greer, 142 Cal. 519, 77 Pac. 1106, quoting 2 Bishop on Marriage, Divorce and Separation, § 1595. And see Hunter v. Hunter, 111 Cal. 261, 52 Am. St. Rep. 180, 13 L. R. A. 411, 43 Pac. 756, holding that a decree in an action for divorce brought by a woman against her first husband, after having lived twenty-two years with her second husband, in which action the summons was served by publication, is only conclusive that her status was no longer that of the wife of the first husband, and is not conclusive

where an issue as to a cause of divorce is determined in a maintenance suit, it cannot be relitigated in a subsequent action for divorce.[13] Thus, where, in an action by a wife for a divorce on the ground of cruelty because of her husband's alleged intimacy with another woman, the court finds the alleged charge to be untrue and gives judgment against her, such judgment is res adjudicata and bars her from pleading the same alleged misconduct in justification of her abandonment of her husband, in his subsequent action for divorce on the ground of desertion.[14] The rule also precludes one who has unsuccessfully brought an action in another state for a limited divorce from maintaining a subsequent action for an absolute divorce in California based upon the same ground. Whether or not such prior judgment constitutes a bar to a subsequent suit does not depend on the difference in relief sought in the two actions, but upon the question whether the same matter put in issue in the second suit between the same parties was actually in issue in the first and adjudicated. If the issue is the same the former judgment is conclusive upon it in any subsequent action between the parties and bars the right to seek a different remedy based on the same facts or cause of action.[15]

as an adjudication that the former husband was then alive, nor that she was his wife when she married her present husband.

13. Greer v. Greer, 142 Cal. 519, 77 Pac. 1106, holding that in an action by a wife for divorce for alleged desertion and for the cancellation of a deed of the husband to his daughter, for the purpose of enforcing alimony, a former judgment for the defendant in an action by her for a maintenance, grounded upon the same alleged desertion and seeking the same relief, in which the court found that there was no desertion, and that plaintiff was not entitled to cancel the deed, or enforce alimony upon the property conveyed, though such judgment was suspended by an appeal, and did not become res adjudicata until affirmed upon the appeal, and though not a proper subject of a plea of another action pending, is admissible in evidence to show that the court in the former action had acquired vested jurisdiction of those matters, and to preclude a retrial of the validity of the transfer or of the alleged desertion in the action for divorce.

14. Civille v. Civille, 22 Cal. App. 707, 136 Pac. 503.

15. Krzepicki v. Krzepicki, 167 Cal. 449, 140 Pac. 13.

However, a judgment is not res judicata as to cause for divorce subsequently accruing.[16] A judgment in favor of the husband, in an action by the wife for a divorce upon the ground of willful neglect, cannot in the nature of things be a bar to her right to assert as a ground of divorce his continued neglect to support her for a year, occurring after the entry of such judgment. Support is a continuing obligation on the part of the husband, and his failure to meet this obligation is a continuing cause for a divorce, unless it appears that there has been an unreasonable lapse of time before the action is commenced; and the husband is not released from this obligation by a judgment in his favor in an action for a divorce upon this ground. If, after such judgment, he continues to disregard this obligation for the period required by the statute as a ground for a divorce, the former judgment cannot avail him as a defense.[17] So also a finding that desertion had not continued for the statutory period prior to the commencement of the action is not a bar to a subsequent action after the accrual of the cause of action.[18]

Dismissal.—A voluntary dismissal of a divorce action, not amounting to a retraxit, is not a bar to a subsequent action concerning the matters involved therein.[19] But a judgment of dismissal rendered upon the merits, after trial

16. Estate of McNeil, 155 Cal. 333, 100 Pac. 1068 (holding that the fact that a husband had commenced a prior suit in another state upon a distinct cause of action upon which he was nonsuited is immaterial, and could not create any estoppel in a subsequent suit in California upon causes of action subsequently arising); Benson v. Benson, 29 Cal. App. 37, 154 Pac. 285.

17. Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935, distinguishing Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906.

18. Lowell v. Lowell, 55 Cal. 316.

19. Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720, stating that Merritt v. Campbell, 47 Cal. 542, involving a judgment of dismissal based upon and entered in pursuance of an agreement of the parties is not in point. See Dismissal, Discontinuance and Nonsuit, ante, p. 502.

in the usual form in equitable actions, does not permit of a relitigation of the issues, unless the dismissal is expressly made without prejudice to a new action.[20]

Interlocutory Decree.

§ 105. Historical.—Experience has shown that the right to have the marriage relation dissolved is often abused; that by collusion and fraud, by fabricated testimony, or by the exaggeration of trifling offenses, divorces are obtained which should not have been granted, and that too frequently actions for divorce are inspired by a desire to become free from old obligations in order to make a new alliance. It had also been found that in some cases difficult complications occur, arising from divorced persons contracting a subsequent marriage before the judgment of divorce became final by the expiration of the time within which an appeal could be taken. To prevent or mitigate these evils it has always been the legislative policy to make many restrictions in the procedure in divorce cases which are not applicable in ordinary actions. In accord with this policy the legislature in 1897 amended section 61 of the Civil Code so as to provide that a marriage contracted by a divorced person during the life of the former spouse, and within one year after the time of the judgment in divorce, should be illegal and void. But this act became practically a dead letter, as the result of a decision to the effect that it was of no effect beyond the confines of the state, and that marriages solemnized during the year within another state, and valid by the laws of such state, must be recognized as valid in California.[1] Accordingly, in 1903, the legislature provided for the entry of an interlocutory decree determining that the party in whose

20. Kuhl v. Kuhl, 124 Cal. 57, 56 Pac. 629.

1. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891, citing Estate of Wood, 137 Cal. 129, 69 Pac. 900.

favor it was rendered was entitled to a divorce, but postponing the entry of a final decree until one year later.[2] It also forbids the marriage of either of the parties during the life of the other, and within one year after the entry of such interlocutory decree. The ultimate object of these provisions, of course, is to reach and mitigate the same evils to which the act of 1897 was directed. And it presents the same obstacle to speedy divorces, the same opportunity for reflection and reconciliation, and the same check to collusion and fraud, and in the meantime it effectually prevents a subsequent marriage with another person by the simple provision that the former marriage, during the interval, shall remain undissolved.[3]

§ 106. Validity of Requirement —Ordinarily, a party in whose favor a case has been decided is entitled to have final judgment entered.[4] The effect of the statute providing for an interlocutory decree in divorce cases is to postpone the entry of final judgment for one year, and if any appeal has been taken from the so-called interlocutory judgment or decision, or motion for new trial made, until the determination of the same. However, the interest of the state in the dissolution of marriages is sufficient to

2. "In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce. After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other." Civ. Code, § 131. Civ. Code, § 132, relating to the entry of final judgment is hereinafter quoted. See infra, § 114.

3. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Civ. Code, §§ 61, 131, 132. For other cases discussing the history of the legislation which resulted in the enactment of the sections providing for the interlocutory decree, see Pereira v. Periera, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 1880, 103 Pac. 488; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273.

4. See JUDGMENTS.

distinguish divorce from all other cases, and the legislature is authorized to enact such laws of procedure as may rationally be held to protect that interest, and to obviate the objection that laws enacted for that purpose are in violation of the constitutional provision against the passage of local or special laws regulating the practice of courts of justice. It follows also that inasmuch as the classification made is intrinsically proper, the act providing for interlocutory decree in divorce actions is general in its nature, and is not in violation of the constitutional provision, providing that all laws of a general nature shall have a uniform operation. Nor is the act objectionable because of its title or because it relates to procedure and is placed in the Civil Code. That code has always contained all provisions of law specially applicable to divorces, including special rules relating to procedure therein.[5]

§ 107. Scope of Issues Included.—Under the amendment of 1903 adding sections 131 and 132 to the Civil Code, the trial court has the power, at the time of rendering the interlocutory judgment of divorce, to try and determine the issues between the parties to the action with respect to property and the custody of children. Unquestionably, it has been said, the court would have power under the present law, as it always has had the power under previous laws, to postpone the trial and decision of property rights and custody of children to any reasonable time after the rendition of the judgment of divorce, whether interlocutory or final. The amendment has not changed its power in this respect But it is proper to try the entire action at the same time as the issues respecting divorce are tried and to give an interlocutory judgment declaring the rights of the parties with respect to prop-

5. Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28, construing Const., art. IV, § 25, subd. 33; Const., art. I, § 11. Cited in Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891, per Shaw, J. See CONSTITUTIONAL LAW, vol. 5, p. 793.

erty and children. And this practice, it is declared, is to be commended to the trial court.[6] If no appeal be taken, such judgment becomes final with respect to those property rights, as well as with respect to the adjudged right to a divorce.[7] Necessarily the same consequence follows where the court takes into consideration and includes in its interlocutory decree the matter of provision for the support of the wife.[8]

§ 108. Effect on Marriage Relation.—The entry of an interlocutory decree does not dissolve the marriage relation, and the parties thereto remain in the legal relation of husband and wife until the marriage has been dissolved by the final judgment.[9] The office of such decree

6. Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. 880, 103 Pac. 488; Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998; Huneke v. Huneke, 12 Cal. App. 199, 107 Pac. 131; John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53 (holding that where the complaint by the husband alleged the selection of a homestead on the separate property of the husband therein described, the court had jurisdiction, and it was its duty, under Civ. Code, § 131, at the time of the hearing and granting of the interlocutory judgment that plaintiff is entitled to a divorce, to hear and determine the issue tendered as to the title to the homestead property, and to include in the interlocutory judgment an assignment of the homestead to the husband, as its former owner, in pursuance of Civ. Code, §§ 146, 147); Glass v. Glass, 4 Cal. App. 604, 88 Pac. 734.

7. Estate of Bollinger, 170 Cal. 380, 149 Pac. 995; Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998; Huneke v. Huneke, 12 Cal. App. 199, 107 Pac. 131; Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273.

8. Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998.

9. Stauter v. Carithers, 185 Cal. 160, 196 Pac. 37; London Guaranty & Acc. Co. v. Industrial Acc. Com., 181 Cal. 460, 184 Pac. 864; Estate of Walker, 176 Cal. 402, 168 Pac. 689; Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; Estate of Walker, 169 Cal. 400, 146 Pac. 868; Estate of Martin, 166 Cal. 399, 137 Pac. 2; Estate of Seiler, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334; Estate of Dargie, 162 Cal. 51, 121 Pac. 320; Periera v. Periera, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488; Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56; Gloyd v. Superior Court, 44 Cal. App. 39, 185 Pac. 995.

is merely that of "declaring that the party in whose favor the court decides is entitled to a divorce."[10] The theory of the cases seems to be that the provision for interlocutory decrees and the subsequent delay of one year before the entry of a final decree was intended to operate as a method of prolonging the action, so as to prevent the divorce from being hastily accomplished, and that the interlocutory decree, so far as the termination of the marriage relation is concerned, at least, is a mere step in the proceedings.[11] Thus if the parties become reconciled after the interlocutory judgment and are living together as husband and wife at the death of the husband, the wife is entitled to the benefit of the provisions of the Code of Civil Procedure declaring a surviving wife entitled to a family allowance out of the estate of the husband.[12] She is also entitled to administration upon his estate, under the provisions of section 1365 of the Code of Civil Procedure.[13] The marriage relation is not dissolved in such case by the death of the husband. Consequently children born within ten months succeeding his death are, under the provisions of section 194 of the Civil Code presumed to be his.[14]

§ 109. Effect on Personal Relations Between the Parties.—While the marriage relation is not ended until final judgment and one of the purposes in the postponement of the entry of final judgment is to provide an opportunity

10. Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; Estate of Dargie, 162 Cal. 51, 121 Pac. 320.

11. Brown v. Brown, 170 Cal. 1, 147 Pac. 1168, per Shaw, J.

12. Estate of Dargie, 162 Cal. 51, 121 Pac. 320.

13. Estate of Walker, 169 Cal. 400, 146 Pac. 868; Estate of Martin, 166 Cal. 399, 137 Pac. 2; Estate of Seiler, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334. See EXECUTORS AND ADMINISTRATORS.

14. Estate of Walker, 176 Cal. 402, 168 Pac. 689, wherein the court said: "In such cases the law declares the presumption and it is the province of the jury alone to determine under all the circumstances what weight in overcoming the same should be accorded the fact that at the time the children were begotten an interlocutory decree of divorce had been granted." See also infra, § 112.

for reconciliation and resumption of maritial relations,[15] nevertheless, after the entry of the interlocutory decree and until some change is effected either by legal act or reconciliation the law contemplates the termination of personal relations between the parties.[16] The result is that, where there is an interlocutory judgment decreeing that the parties are entitled to a divorce, even though the married status continues, the law, under the circumstances, permits the separation and recognizes it as rightful in substance. Such separation is therefore clearly lawful, within the meaning of that term as used in section 223 of the Civil Code, which provides, in part, that a married woman not "lawfully separated" from her husband cannot adopt a child without her husband's consent.[17]

§ 110. **Effect on Husband's Liability for Wife's Support.** An interlocutory judgment is, so far as it determines the rights of the parties, a contract between them. While temporary and provisional in its nature, it settles the rights of the parties for the time being and until some action, proceeding or motion is begun to change the status and some order is made thereon which has that effect, or until the parties become reconciled and resume marital relations, in which event their mutual obligations are, for the time being at least, restored.[18] The parties are, by virtue of the interlocutory judgment, living separate by agreement, and, if that judgment makes no provision for the wife's support by the husband, they are living sepa-

15. Stauter v. Carithers, 185 Cal. 160, 196 Pac. 37; Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706. See supra, § 108.

16. Stauter v. Carithers, 185 Cal. 160, 196 Pac. 37; Estate of Walker, 180 Cal. 478, 181 Pac. 792; Estate of Walker, 176 Cal. 402, 168 Pac. 689.

17. Stauter v. Carithers, 185 Cal. 160, 196 Pac. 37.

18. Stauter v. Carithers, 185 Cal. 160, 196 Pac. 37; London Guaranty & Acc. Co. v. Industrial Acc. Com., 181 Cal. 460, 184 Pac. 864; Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56.

rate by an agreement which does not provide for her support, and under section 175 of the Civil Code he is not, during the interval between the interlocutory and final judgment, personally liable for her support. While such judgment does not dissolve the marriage status, the personal obligations between the parties remain in abeyance until changed by some subsequent action or agreement which is binding upon the husband.[19]

§ 111. Effect on Property Rights.—Since an interlocutory decree does not sever the marriage relation,[20] it follows that such decree has no effect on the operation of the statutes which declare the wife's rights in the property of which the husband dies possessed nor upon the statutes declaring the status of the property acquired by him during the marriage.[1] Accordingly, property acquired by the husband otherwise than by gift, devise or descent, after the divorce action is begun and before the final decree, is community property, notwithstanding it was acquired after the interlocutory decree. There is, it has been said, nothing anywhere in the law that justifies any distinction, in this respect, between property acquired before the suit is begun and that acquired afterward dur-

19. London Guaranty & Acc. Co. v. Industrial Acc. Com., 181 Cal. 460, 184 Pac. 864 (holding that, under the Workmen's Compensation Act (Stats. 1917, p. 845), a wife who was not living with her husband at the time he received injuries causing his death, and who had obtained an interlocutory judgment of divorce upon a complaint which alleged a cause of action for willful neglect and did not ask for alimony or any other provision for her support, and which judgment made no such provision and contained no reservation of jurisdiction to award any alimony or maintenance, is not entitled to compensation for his death, since at the time of such death he was not legally liable for her support. And see Perry v. Industrial Acc. Com., 176 Cal. 706, 169 Pac. 353. See notes, 13 A. L. R. 729, 8 A. L. R. 1113 as to effect of divorce on right of spouse or child to compensation under Workmen's Compensation Act.

20. See supra, § 108.

1. London Guaranty & Acc. Co. v. Industrial Acc. Com., 181 Cal. 460, 184 Pac. 864.

ing the existence of the marriage relation, or to sanction the theory that the interlocutory decree affects the character of property acquired afterward and not disposed of thereby.[2] But where, in an action by a wife for a divorce upon a complaint which alleges that there is no community property, the defendant after personal service makes default and final judgment is rendered dissolving the marriage but making no order, directions or even mention of property, or other rights, such judgment becomes, in effect, a contract between the parties that the judgment shall be final with respect to everything properly embraced within the allegations of the complaint and in the prayer for relief, and operates as an adjudication that at the time the action was begun there was no community property.[3] Such a judgment, however, is not an adjudication of the nonexistence of community property which was acquired by the husband after the commencement of the action and the rendition of the interlocutory decree, notwithstanding the parties might have litigated their rights as to such property in the divorce action at the time of the rendition of the final decree. Consequently such judgment does not prevent the wife from claiming subsequently an interest in the community property so acquired.[4]

§ 112. As Evidence of Nonintercourse.—An interlocutory decree suspends marital rights and obligations and the usual incidents of the marital relation, and destroys any inference or presumption from the fact of marriage

2. Brown v. Brown, 170 Cal. 1, 147 Pac. 1168, per Shaw, J.

3. Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; Stone v. Stone, 38 Cal. App. Dec. 534, 208 Pac. 993 (holding the rule applicable where the service was by publication and where the defendant had no actual knowledge of the contents of the complaint until a month after the interlocutory decree was entered). And see Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56 (holding an interlocutory decree a contract in regard to the property rights therein determined).

4. Brown v. Brown, 170 Cal. 1, 147 Pac. 1168.

that the parties are living together or having intercourse.[5] Accordingly, such a decree is admissible for the purpose of rebutting the presumption as to the legitimacy of the issue of a wife cohabiting with her husband, who is not impotent, the decree being a judicial determination that at the time the children were begotten the wife was not cohabiting with the husband. Standing alone, it has been said that it might have little weight, but considered with other facts it might be of probative value as tending at least to show the improbabilities of parties occupying such relation indulging in an act, which, though not affecting the legitimacy of the children, must in the absence of a reconciliation of the parties be deemed essentially immoral.[6]

§ 113. Finality of Interlocutory Decree.—Despite the old equity rules, under which preliminary interlocutory orders had none of the characteristics of final decrees, the statutory interlocutory decree in divorce suits is final, except as against such attack as is authorized by statute for the modification or vacating of final judgments.[7] Such a decree, if not void upon its face, is subject to attack only in the action in which it is entered upon appeal or by proceedings under section 473 of the Code of Civil Procedure, upon notice to the defendant.[8] If regularly made and correctly entered, it cannot be vacated upon the bare application of the plaintiff without notice to or consent of the defendant, even though the defendant suffered default.[9] Indeed, it is expressly provided in section 131

5. Estate of Walker, 180 Cal. 478, 181 Pac. 792.

6. Estate of Walker, 176 Cal. 402, 168 Pac. 689, per Shaw, J. See same case, 180 Cal. 478, 181 Pac. 792, holding an instruction as to the effect of the decree as evidence erroneous as being on the weight of evidence, but harmless in view of other instructions. See ILLEGITIMACY.

7. Bancroft v. Bancroft, 178 Cal. 367, 173 Pac. 582; Stuttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032; Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56.

8. See supra, § 100.

9. Even if an order so attempting to vacate the interlocutory decree

of the Civil Code, that "After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other."[10] And after the expiration of the time in which to appeal or to move to vacate the decree, the trial court is wholly without jurisdiction to alter or set it aside.[11] While the court has the inherent power to refuse to enter a final decree dissolving the marriage, where it is made to appear that, upon a condonation of the offense upon which the interlocutory judgment is based, the parties resumed the marital relations,[12] it does not follow from such fact that the court, after the lapse of a year, has jurisdiction to vacate an interlocutory judgment the integrity of which, in so far as it determines the facts properly involved therein, is unaffected by subsequent relations of the parties. The facts having been thus judicially determined by a final

upon the application of the plaintiff without notice to the defendant is not void on its face, the defendant, notwithstanding his default, has such standing in the action as entitles him to insist upon the integrity of the decree, and to move to vacate the order under the provisions of section 473 of the Code of Civil Procedure. Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032.

10. Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032. See Huneke v. Huneke, 12 Cal. App. 199, 107 Pac. 131, and Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273, which contain an intimation to the contrary, but which were decided prior to the amendment of Civ. Code, § 131, in 1909, adding the provision quoted in the text.

11. Bancroft v. Bancroft, 178 Cal. 367, 173 Pac. 582; Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032; Estate of Bollinger, 170 Cal. 380, 149 Pac. 995 (holding that where there has been no appeal from an interlocutory judgment wherein property rights were adjudicated, such rights become finally and irrevocably settled upon the expiration of the period in which an appeal might be taken); Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Dell v. Superior Court of San Diego County, 35 Cal. App. Dec. 596, 200 Pac. 85; Mathews v. Mathews, 33 Cal. App. Dec. 299, 193 Pac. 586; Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56; Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998; Huneke v. Huneke, 12 Cal. App. 199, 107 Pac. 131; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897; Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273.

12. Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706. See infra, § 115.

judgment, that judgment can only be set aside by a proceeding in the nature of a direct attack thereon.[13]

Final Judgment.

§ 114. Entry in General.

"When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce."[14]

This provision is mandatory and forbids the entry of a final judgment until after the prescribed period, even though the parties attempt to waive it.[15] A final decree,

13. Dell v. Superior Court of San Diego County, 35 Cal. App. Dec. 596, 200 Pac. 85, distinguishing Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706, and holding, further, that prohibition will lie to restrain the trial court from vacating the interlocutory judgment in such a case.

14. Civ. Code, § 132, in part, Weeks v. Superior Court, 187 Cal. 620, 203 Pac. 93; Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706.

15. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891. See the following cases decided before the statute providing for interlocutory decrees: White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062 (holding that in an action for divorce, in which no power is reserved to render further relief, the decree is conclusive of the rights of the parties, as to the relief granted, as well as to the relief withheld, and the court is without jurisdiction to render any other or further judgment or relief in the action); Holt v. Holt, 107 Cal. 258, 40 Pac. 390 (duty of clerk to enter judgment); In re Cook, 83 Cal. 415, 23 Pac. 392 (holding that a judgment becomes operative between the parties at the time of its rendition, though it is not entered by the clerk until a subsequent date, or until after the death of the plaintiff); Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131 (holding that a judgment decreeing a divorce and providing for a division of the community property is the final judgment, although it contains ancillary provisions appointing a referee to take testimony and report as to what property is community; and a motion for a new trial, made after the entry of such judgment, but before the coming in of the referee's report, is not premature). In re Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431 (holding that a judgment of divorce becomes "rendered" at the time the court pronounces its decision, and it is not necessary to its validity that it should be in writing or signed by the judge; and holding the judgment may be entered after the death of the plaintiff); In re New-

entered immediately after the trial or hearing, is absolutely void upon its face in so far as it purports to be final;[16] and the court has power after the lapse of more than one year thereafter to modify it by vacating so much thereof as awards an absolute decree, without affecting the decree in so far as it may determine that the plaintiff is entitled to a divorce.[17] However, a decree which purports to be final judgment, may nevertheless stand as a valid interlocutory decree, if in form it is sufficient therefor,[18] unless the two portions are so inseparably connected that the one cannot be declared void without vitiating the other.[19]

Upon the proper construction of the code an interlocutory decree must be entered in the judgment-book one year before a final decree can be granted; a mere order for an interlocutory decree entered in the minutes of the court after a hearing, with nothing further done, being insufficient within the rule,[20] and the time for entry must be computed from the time of the actual entry of such interlocutory judgment, and not from any theoretical nunc pro tunc date of entry.[1] But where the court, after the

man, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887 (holding that after being signed by the judge and filed with the clerk, a judgment is binding on the parties and their privies, although not entered by the clerk).

See note, 3 A. L. R. 1421, as to power to enter judgment nunc pro tunc after death of party.

16. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891. See note, 1 A. L. R. 1591, as to right to enter final decree after time fixed by interlocutory decree expires.

17. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891 (holding that prohibition will not lie to prevent such order or further proceedings thereunder).

18. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897, holding that a decree declaring that "It appears that all the allegations of the complaint are sustained by competent testimony; that said matter, so alleged and proved in behalf of plaintiff, is sufficient in law to entitle said plaintiff to the relief as prayed for in said complaint," is sufficient in form for a valid interlocutory judgment.

19. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897.

20. Smith v. Superior Court, 147 Cal. 336, 82 Pac. 79.

1. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Nolte v. Nolte, 29

lapse of a year from the interlocutory part of what purported to be a final decree, refused a request to enter the final decree, because an interlocutory decree ordered to be entered nunc pro tunc was not actually entered until a much later date, and a year therefrom had not expired, mandamus will lie to compel the entry of the final decree, without regard to the nunc pro tunc date of entry.[2] That mandate is an appropriate remedy to compel the entry of a final decree where the court's duty is plain and unmixed with the exercise of discretionary powers has been said not to admit of debate.[3]

Effect of filing of answer.—The mere filing of an answer with permission of the court but without notice to the plaintiff does not vacate the interlocutory decree and prevent the entry of a valid final decree, as a valid decree cannot be vacated without notice and hearing.[4]

§ 115. On Whose Motion Entry is Made.—By the express terms of the statute a final decree of divorce may be entered on motion of the plaintiff[5] or defendant[6] or by the court on its own motion. Although it is somewhat anomalous that the wrongdoer in an action in equity should be permitted to demand affirmative relief and compel the court to visit upon him the legal consequences of his wrongful acts, it is nevertheless true that the code has provided that the final decree may be entered by the court

Cal. App. 126, 154 Pac. 873, holding that the entry of a final decree within a week after the actual entry of the interlocutory decree nunc pro tunc as of a date one year previous, is void, and may be vacated at any time on motion of either party or of the court.

2. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897.

3. Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706; Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998. See MANDAMUS.

4. Andreen v. Andreen, 15 Cal. App. 728, 115 Pac. 761.

5. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998.

6. Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032; Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897.

"on motion of either party."[7] The clerk is not empowered to enter the decree of his own motion, however. The statute requires that the court shall again act in the case by declaring the final judgment.[8] It is clear that the entry of a final decree is a judicial act and not merely a clerical act consequent upon a previous judicial act. Although by the interlocutory decree it has been declared that the prevailing party is entitled to a divorce and the time for appeal therefrom may have expired, that right is subject to defeat by events occurring after the interlocutory decree has been entered.[9]

§ 116. Discretion of Court—Subsequent Reconciliation. That the word "may" in the statute providing that the court "may enter the final judgment granting the divorce" after the expiration of a year after the entry of an interlocutory decree means "must" when the facts are shown entitling the movant to such final decree, has been said to require no discussion, nevertheless the trial court is not without some discretion in the matter of withholding the relief sought, because of matters occurring subsequent to such interlocutory decree. Of course, barring the familiar equitable considerations of fraud or mistake in the procurement of this decree, all matters therein litigated have passed beyond the possibility of future litigation.[10] Yet from its very nature the interlocutory decree can operate only upon facts existing down to the time it is given. It is within the contemplation of the law that facts subsequently arising should have their influence in determining the right to a final decree.[11] And the courts

7. Civ. Code, § 132; Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706; Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897.

8. Estate of Dargie, 162 Cal. 51, 121 Pac. 320.

9. Gloyd v. Superior Court, 44 Cal. App. 39, 185 Pac. 995. See infra, § 116.

10. Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706. See supra, § 107 et seq.

11. Weeks v. Superior Court, 187 Cal. 620, 203 Pac. 93; Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706; Gloyd v.

inherently possess, under the present statute and without express authorization, the power to recognize condonations and reconciliations and to do justice as may be demanded by such events as have arisen subsequent to the entry of the interlocutory decree and before the expiration of the fixed period of one year.[12] Indeed, it has been declared that one of the important purposes of the law is to give the spouses a chance to effect a reconciliation which the law always favors.[13]

§ 117. Where Movant is in Contempt of Court.—A party to an action for divorce is not entitled to have a final decree entered when to do so would be a flagrant abuse of the principles of equity and of the due administration of justice.[14] It has been reasoned that when one becomes a voluntary actor before a court and seeks its aid, it is manifestly proper that in invoking that aid he should submit himself to all legitimate orders and processes. No party to an action can, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt.[15] So where one has treated an order concerning the custody and control of a minor child of the parties with contempt and removed himself and the minor from the jurisdiction so that it cannot be enforced, he will not be allowed to

Superior Court, 44 Cal. App. 39, 185 Pac. 995.

12. Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706, holding that the court may refuse to enter a final decree on motion of the condonee, where, before the time when the final decree could have been entered, the innocent spouse condoned the offense for which the interlocutory decree was given, and thereupon the spouses became reconciled and thereafter continuously lived together as husband and wife for five years.

13. Olson v. Superior Court, 175 Cal. 250, 1 A. L. R. 1589, 165 Pac. 706; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28, per Mr. Justice Angellotti. Gloyd v. Superior Court, 44 Cal. App. 39, 185 Pac. 995; Barron v. Barron, 7 Cal. Unrep. 345, 96 Pac. 273.

14. Weeks v. Superior Court, 187 Cal. 620, 203 Pac. 93.

15. Weeks v. Superior Court. 187 Cal. 620, 203 Pac. 93, per Waste, J.

make application for final decree of divorce until he has submitted to the lawful order of the court in relation to the custody of the child or otherwise purged himself of the contempt.[16]

§ 118. Effect of Motion for New Trial, Appeal or Death of Party.—Section 132 of the Civil Code provides that "if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed."[17] This provision, it has been said, was adopted in recognition of the fact that in granting a divorce the court has a variety of duties to perform affecting the property rights of the parties and the future welfare of those parties and their children; and it was deemed advisable that in such cases all of those matters, as far as possible, should be finally adjusted in connection with the granting of a divorce.[18] By the terms of the statute the entry of final judgment must be postponed only by an appeal from the interlocutory judgment itself or a motion for a new trial. An appeal from an order refusing to vacate and set aside an interlocutory judgment upon the ground that its entry was due to inadvertence, mistake or excusable neglect is not an appeal from the interlocutory judgment within the meaning of the statute.[19]

Effect of death.—The last clause of section 132 of the Civil Code expressly provides that "The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment

16. Weeks v. Superior Court, 187 Cal. 620, 203 Pac. 93, citing State ex rel. Hunter v. Ronald, 106 Wash. 413, 180 Pac. 125.

17. Quinn v. Quinn, 33 Cal. App. Dec. 267, 193 Pac. 593; Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998.

18. Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998.

19. Quinn v. Quinn, 33 Cal. App. Dec. 267, 193 Pac. 593.

as hereinbefore provided."[20] This provision was designed to enable the court to establish, by final decree rendered after the death of a party, property rights which had been passed upon, provisionally or otherwise in the interlocutory decree.[1] But, it is said, such final decree could not have been intended to effect the dissolution of the marriage, a result already accomplished by the death of one of the parties. Nor was it intended to empower the court to enter a decree which should operate retroactively to take away rights of inheritance which had, by the death, become vested in the surviving spouse.[2] If the interlocutory decree does not purport to adjudicate property rights of any character, upon the death of the plaintiff during the ensuing year, the superior court loses jurisdiction to proceed further in the case, because the death dissolved the marriage, and extinguished the pre-existing marriage status which formed the subject matter of the action, leaving nothing upon which the only final decree that could be made could operate.[3] But where the interlocutory decree purported to confirm and provide for the performance of a property agreement between the husband and wife and providing for the payment of sums to the wife for her support, the death of the husband does not deprive the court of jurisdiction to enter a final decree in reference to the property rights.[4] Inasmuch as a husband and wife may, even if no divorce

20. Estate of Seiler, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334; Gloyd v. Superior Court, 44 Cal. App. 197, 191 Pac. 56.

1. Estate of Seiler, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334; Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. 880, 103 Pac. 488; Gloyd v. Superior Court, 44 Cal. App. 39, 185 Pac. 995.

2. Estate of Seiler, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334; Gloyd v. Superior Court, 44 Cal. App. 39, 185 Pac. 995, issuing a writ of prohibition to restrain the superior court from entering a final decree where by reason of the death of one of the parties it has lost its power in that respect, and overruling anything in John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53, in conflict with this conclusion.

3. Gloyd v. Superior Court, 44 Cal. App. 39, 185 Pac. 995.

4. Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56.

action is pending, make such contracts as they may choose respecting property,[5] such contracts, whether made in an action for divorce or otherwise, are valid, and the rights thereunder do not of necessity cease upon the death of either party. Consequently the subject matter of the interlocutory decree, so far as such rights are concerned, is not extinguished by the death of a party during the year succeeding the interlocutory decree, and the court to that extent retains jurisdiction.[6]

§ 119. Further Relief on Final Judgment.—The code provides that upon granting the final decree the court may give "such other and further relief as may be necessary to complete disposition of the action."[7] This provision evidently relates to cases where an allowance for the care and custody of the children of the marriage has been made, or where a sale or partition of the property has been ordered in the interlocutory decree, or where the court has made an order that certain property be conveyed to be held in trust to secure permanent alimony, and matters of such import. The legislature "clearly did not contemplate that at the end of the year either party could file a supplemental complaint, and allege a new cause of action for divorce, or that the defeated party could, by such supplemental pleading, set forth a cause of action by way of recrimination, so as to prevent the party who prevailed at the first trial from having a decree en-

5. Civ. Code, § 159; Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56.

6. Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56; John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53 (holding that where, after the lapse of the year without appeal, the plaintiff properly moved for a final judgment, the death of the plaintiff pending the disposition of the motion and of counter-motions of the defendant relating to the question of property rights." McMullin v. McMullin, 123, locutory decree did not impair the power of the court to render final judgment for the plaintiff, under the provisions of section 132 of the Civil Code and of section 669 of the Code of Civil Procedure).

7. Civ. Code, § 132; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897.

tered after the expiration of the year." Nor did it contemplate that at that time either party could present new issues or bring in new witnesses, as to any cause of action or defense discovered since the entry of the interlocutory decree.[8-9] On the other hand, it is said that the legislature clearly contemplated that the interlocutory decree should settle the question as to whether or not a divorce should be granted, the question of the disposition of the property rights, and all other issues involved.[10]

§ 120. Effect.—A final judgment of divorce, when entered, has the effect of restoring the parties to the state of unmarried persons,[11] and either is free to marry again.[12] The mere expiration of one year from the date of the entry of an interlocutory decree does not by force of law dissolve the marriage. To effect such dissolution, after the expiration of one year after the entry of the interlocutory decree, the statute requires the entry of a final judgment granting the divorce,[13] and until that time, or until the death of a party, the parties remain in the legal relation of husband and wife.[14] If, however, one of

8–9. Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897, per Cooper, J.

10. Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897. And see supra, § 107.

11. Civ. Code, §§ 91, 132. See Estate of Wood, 137 Cal. 129, 69 Pac. 900, decided before the statute providing for interlocutory decrees, and holding the rendition of the final judgment dissolves the marriage, regardless of the fact that the judgment is appealable, and regardless of the fact that it may be set aside on motion. See note, 6 A. L. R. 1038, as to effect of divorce on right of one spouse to maintain an action against the other for assault and battery under the Married Woman's Acts.

12. Stauter v. Carithers, 185 Cal. 160, 196 Pac. 37, stating that a divorced person is no longer "married" as that term is used in Civ. Code, § 223, relating to adoption. See infra, § 121.

13. Estate of Dargie, 162 Cal. 51, 121 Pac. 320.

14. Estate of Seiler, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334; Estate of Dargie, 162 Cal. 51, 121 Pac. 320; Periera v. Periera, 156 Cal. 9, 134 Am. St. Rep. 107, 23 L. R. A. 880, 103 Pac. 488; Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28.

the parties should die before the entry of final judgment, the marriage is dissolved thereby, and the entry of the final decree thereafter has no effect upon the personal status of the surviving party.[15]

Legitimacy of children.

"When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage begotten of the wife before the commencement of the action is not affected."[16]

"When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the court, upon the evidence in the case."[17]

XI. RIGHT TO REMARRY.

§ 121. In General.—A court dissolving the bonds of matrimony has no power to impose any restraint upon a second marriage, in the absence of express statute conferring it. With the dissolution, the obligations arising from the marriage are completely discharged, and the parties stand in the same position as though such marriage had never been contracted.[18] An interlocutory decree, as already stated, does not have the effect of dissolving a marriage, but merely declares that the party in whose favor the court decides is entitled to a divorce,[19] and hence the parties are not permitted to marry again[20] until the entry of final decree,[1] or until after the death of a party. It is expressly provided that "In no case can a

15. Estate of Seiler, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334; Estate of Dargie, 162 Cal. 51, 121 Pac. 320; Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56.

16. Civ. Code, § 144.

17. Civ. Code, § 145.

18. Barber v. Barber, 16 Cal. 378.

19. Supra, § 108.

20. Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28.

1. See infra, § 122.

marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce."[2] And that the entry of final judgment "shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either."[3]

§ 122. After Final Decree.—Since the final judgment terminates the marriage relation and restores the parties to the status of single persons,[4] either is competent thereafter, in so far as the prior marriage is concerned, to enter into another marriage.[5] Prior to the adoption of the statute providing for interlocutory decrees, it was held that the parties might at once contract another marriage regardless of the fact that the judgment was appealable or might be set aside on motion.[6] Whether or not the final judgment under the present practice is appealable, the determination of the right to divorce is now reviewable upon appeal from the interlocutory decree, but not upon appeal from the final judgment, so that the danger of displacing the husband or wife so taken by the subsequent marriage by a reversal of the judgment is obviated.[7]

§ 123. Extraterritorial Effect of Prohibition on Remarriage.—The prohibition to remarry after the dissolution of a marriage by divorce is generally regarded as a penalty and not as becoming by operation of law a part of the divorce decree. Hence statutes providing that neither

2. Civ. Code, § 61, subd. 1.
3. Civ. Code, § 132.
4. See supra, § 120.
5. Civ. Code, § 132. Estate of Seiler, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334; Estate of Dargie, 162 Cal. 51, 121 Pac. 320; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466; Estate of Wood, 137 Cal. 129, 69 Pac. 900.
6. Estate of Wood, 137 Cal. 129, 69 Pac. 900.
7. Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28.

party to a divorce shall be capable of contracting marriage with a third person within a certain time after the entry of the decree of divorce, or within the time in which an appeal may be taken in the case, while effectual as to subsequent marriages within the state where the divorce was granted,[8] have no extraterritorial effect.[9] And the marriage of a person in violation thereof in another state is valid.[10] On the other hand, a party to an interlocutory decree of divorce is not divorced until the entry of final decree,[11] and a subsequent marriage by him to a third person is illegal and void, wherever contracted.[12]

XII. APPEAL AND ERROR.

§ 124. Jurisdiction.—The constitution confers appellate jurisdiction on the supreme court in all cases in equity, except such as arise in justices' courts,[13] and it has been decided that an action for divorce is a case in equity within the meaning of this provision,[14] and that the supreme court has appellate jurisdiction over all questions

8. Estate of Elliott, 165 Cal. 339, 132 Pac. 439, holding further that the repeal of the statute when the provision as to interlocutory decrees was adopted did not have the effect to validate a marriage contracted in California under the prior law, which was invalid because entered into within one year of the divorce in this state of one of the parties.

9. Estate of Woods, 137 Cal. 129, 69 Pac. 900; People v. Woodley, 22 Cal. App. 674, 136 Pac. 312. See CONFLICT OF LAWS, vol. 5, p. 446.

10. People v. Woodley, 22 Cal. App. 674, 136 Pac. 312.

11. See supra, § 108.

12. Civ. Code, § 61, Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488; Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; Estate of Wood, 137 Cal. 129, 69 Pac. 900; People v. Woodley, 22 Cal. App. 674, 136 Pac. 312.

13. See COURTS, vol. 7, p. 669.

14. Harron v. Harron, 123 Cal. 508, 56 Pac. 334; Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; Stewart v. Torrance, 9 Cal. App. 209, 98 Pac. 396. See Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717, upholding the jurisdiction of the supreme court in divorce cases under the constitution of 1849. See COURTS, vol. 7, p. 599.

arising therein, regardless of the amount involved.[15] A district court of appeal has no appellate jurisdiction of divorce actions in the first instance, and it has no jurisdiction in mandamus to compel a judge of the superior court to settle a bill of exceptions to be used upon appeal in such a case, even though an appeal is taken thereto. To assume such jurisdiction would be to review a matter not within its jurisdiction and to invade the province of the supreme court.[16]

§ 125. Appealable Orders—Time to and Effect of Appeal.—An appeal may be taken from a superior court from a final judgment of divorce, as in other cases,[17] and it may also be taken from interlocutory decrees of divorce.[18] But an independent appeal cannot be taken from an interlocutory order with respect to the custody of a minor child,[19] or to an order setting aside the findings of a referee, and sending the case back to the referee for further testimony.[20] So also an order refusing to vacate a former order is not appealable as a general rule,[1] although an appeal has been held to lie from an order refusing to vacate a judgment in a divorce action, where there is no other method by which the right of the appellant to the relief sought by him can be presented to the appellate court and the facts on which he bases his claim to relief do not appear from an inspection of the judgment-roll.[2]

15. Harron v. Harron, 123 Cal. 508, 56 Pac. 334, holding that the supreme court has jurisdiction of an appeal from a special order made after final judgment in favor of the plaintiff requiring the defendant to pay counsel fees and costs to enable the plaintiff to contest the defendant's motion for a new trial in the superior court, though the amount involved in such appeal is less than three hundred dollars; overruling Langan v. Langan, 83 Cal. 618, 23 Pac. 1084, and limiting Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101, so far as holding to the contrary. See APPEAL AND ERROR, vol. 2, p. 201.

16. Stewart v. Torrance, 9 Cal. App. 209, 98 Pac. 396.

17. Code Civ. Proc., § 963, subd. 1.

18. Code Civ. Proc., § 963, subd. 2.

19. McNett v. McNett, 44 Cal. App. 778, 187 Pac. 447.

20. Baker v. Baker, 10 Cal. 527.

1. See APPEAL AND ERROR, vol. 2, p. 163.

2. De La Montanya v. De La

An order entered in the minutes, after issue joined, denying relief to both parties is not a final judgment where findings have not been waived or filed, and consequently an order thereafter made denying a motion for an order directing the issuance of execution for unpaid alimony is not appealable as a special order after final judgment.[3]

Time to appeal.—The time for taking an appeal from a decree of divorce runs from the date of its entry.[4] If the appeal is not taken within the time allowed therefor, the supreme court has no jurisdiction and the appeal must be dismissed.[5]

Effect of appeal.—An appeal from an order vacating a judgment of divorce obtained by the husband against the wife cannot affect or suspend the operation of a prior decree rendered in an action for maintenance brought by the wife against her husband, the decree in which had become final. The judgment of divorce having been vacated, the parties cannot be considered as divorced.[6]

§ 126. Right to Urge Error—Adherence to Theory.—As in other cases, the appellant in a divorce action cannot complain of errors affecting the respondent.[7] And it is a general rule that where the different provisions of a judgment are so connected that a part cannot be reversed

Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 354.

3. Cuneo v. Cuneo, 40 Cal. App. 564, 181 Pac. 229.

4. Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488; Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; Nolte v. Nolte, 29 Cal. App. 126, 154 Pac. 873 (stating that the entry of the interlocutory decree nunc pro tunc as of an earlier date does not affect the time within which an appeal may be taken); Andreen v. Andreen, 15 Cal. App. 728, 115 Pac. 761; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897. See APPEAL AND ERROR, vol. 2, p. 397.

5. Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016; Begbie v. Begbie, 128 Cal. 154, 49 L. R. A. 141, 60 Pac. 667. See APPEAL AND ERROR, vol. 2, p. 393.

6. Smith v. Superior Court, 136 Cal. 17, 68 Pac. 100.

7. Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582. See APPEAL AND ERROR, vol. 2, p. 841.

without a reversal of the whole, a party is not permitted to enforce the provisions of the judgment in his or her favor and appeal from the adverse portions thereof. Hence, where a decree of divorce is granted or denied, an acceptance of the payments of the alimony awarded by the judgment estops the wife from making a motion for a new trial for the purpose of having the judgment reviewed on appeal, or from taking an appeal.[8] To have this effect the acquiescence must clearly appear. And where a judgment relates to distinct matters acquiescence therein as to one of such matters does not bar an appeal as to the others. Accordingly, where it appears that the parties have determined their property rights by stipulation and thereby removed the issue as to property from the dispute over the right to a divorce, the compliance by either party with the agreed portions of the judgment which were independent parts of the decree does not preclude him from appealing therefrom.[9]

A remarriage estops a party entering into it from denying the validity of a previous divorce.[10] But this rule does not apply where there was not even the semblance of legal proceedings for a divorce. To hold that an estoppel arose from the subsequent marriage in such a case would be the equivalent of saying that a divorce could be secured by contract.[11] However, when a court erro-

8. Storke v. Storke, 132 Cal. 349, 64 Pac. 578; McCaleb v. McCaleb, 32 Cal. App. 648, 163 Pac. 1045. See APPEAL AND ERROR, vol. 2, p. 849. But compare Daroux v. Daroux, 35 Cal. App. Dec. 424, 199 Pac. 1112, holding that in view of the fact that the settlement of the property rights of the parties to an action for divorce is a mere incident to the main purpose of the action, and also in view of the disposition of the courts to hear and determine actions for divorce, upon both trial and appeal upon their merits, an appeal will not be dismissed because the appellant has received and retained certain portions of the property in dispute between the parties and dealt with in the interlocutory decree.

9. Duncan v. Duncan, 175 Cal. 693, 167 Pac. 141.

10. Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917E, 122, 155 Pac. 988, citing many authorities.

11. Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917E, 122, 155 Pac. 988, citing Norton v. Tufts, 19 Utah, 470, 57 Pac. 409.

neously grants a divorce upon the uncorroborated admission of a party, the party making the admission is not precluded from urging error in this respect.[12] And it is no ground for dismissing an appeal from a judgment granting a divorce, and awarding the custody of the minor children of the parties, that the appellant has violated the order appealed from and removed the children from the jurisdiction of the court. This is not a ground of dismissal under the code or the rules of the supreme court. Appeals involving the merits of divorce actions should not be dismissed, except upon clear authority so to do.[13]

Adherence to theory of case.—Under the general rule that a pleader cannot change the theory of his case, for the first time in the appellate court,[14] one who draws a complaint for divorce with a view to charging extreme cruelty cannot claim, in the supreme court, that it states a cause of action for habitual intemperance.[15]

§ 127. Review Generally.—Matters occurring prior to the inception of the action and determined by the interlocutory decree of divorce may be reviewed, upon appeal therefrom, but they cannot be made the subject of review upon an appeal from the final decree.[16] In this respect, the intermediary judgment occupies, as to the matters properly embraced therein, the same position as an interlocutory decree in partition, and is not reviewable upon the appeal from the final judgment. Whether or not all the issues made by the pleadings in a divorce case must

12. Bennett v. Bennett, 28 Cal. 599. Cited in Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837.

13. Vosburg v. Vosburg, 131 Cal. 628, 63 Pac. 1009; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425. See APPEAL AND ERROR, vol. 2, p. 743.

14. See APPEAL AND ERROR, vol. 2, p. 237.

15. Haskell v. Haskell, 54 Cal. 262.

16. Bancroft v. Bancroft, 178 Cal. 366, 173 Pac. 585; Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032; Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Newell v. Superior Court, 27 Cal. 343, 149 Pac. 998; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897.

be determined by the interlocutory judgment, it is clear that the question as to whether a party is entitled to a divorce must be determined thereby; and an appeal from that determination being given by law, such determination is thereby taken out of the category of orders examinable upon appeal from the final judgment.[17] The objection that the evidence in a divorce proceeding was not sufficient to establish the jurisdictional fact of plaintiff's residence is one which should be raised on an appeal from the judgment and not on an appeal from an order denying the defendant's motion to vacate the decree of divorce,[18] in accordance with the rules relating to appeals in civil actions generally.[19] On appeal from an interlocutory decree of divorce, it must be presumed, in the absence of all evidence, that there was ample evidence of residence within the state for a period of one year before the commencement of the action to support the judgment.[20]

§ 128. Review of Sufficiency of Evidence.—The principles governing the review of judgments and decrees in civil actions generally, are applicable of course to the review in divorce cases. As in other cases, every intendment is in favor of the findings of the trial court in a divorce case. Such findings are not to be overthrown on appeal unless it is very plain to the appellate court that

17. Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28.

If an interlocutory decree in a divorce action is to be deemed a "final judgment," within the meaning of the provision of Code Civ. Proc., § 963, declaring that an appeal may be taken "from any special order made after final judgment," then it would seem that an order denying a defendant's motion to retax certain items of cost, and also to strike from the decree a provision for attorney's fees, would be reviewable only on a direct appeal therefrom, and not on an appeal from the interlocutory decree. Dracovich v. Dracovich, 35 Cal. App. Dec. 519, 200 Pac. 44, not deciding the point.

18. Lindley v. Lindley, 33 Cal. App. Dec. 383, 194 Pac. 85. See APPEAL AND ERROR, vol. 2, p. 164 et seq.

19. See APPEAL AND ERROR, vol. 2, p. 852.

20. Dillon v. Dillon, 45 Cal. App. 191, 187 Pac. 27.

the conclusion reached cannot be supported on any rational view of the testimony,[1] particularly when the finding is against a divorce.[2] And in view of the care with which the law has sought to guard against collusive divorce proceedings, the rule just stated should be applied in its full force to a finding in favor of a defaulting defendant in a divorce suit.[3] As in other cases, the weight and sufficiency of the evidence offered in a divorce action is a matter for the trial court, and a court of review cannot disturb its findings if there is any substantial evidence to support them, or if the evidence is conflicting;[4] provided, of course, that there is the requisite corroboration.[5] This rule has been applied to findings with reference to the following matters: that the plaintiff resided in the state or county the requisite period;[6] that the defendant was or

1. Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016 (and on appeal from a judgment in his favor, taken without any bill of exceptions, and without any findings, the supreme court must presume that there was evidence sufficient to support the allegations of the complaint). Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298.

2. Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016.

3. Waldecker v. Waldecker, 178 Cal. 566, 174 Pac. 36; Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367.

4. Percy v. Percy, 63 Cal. Dec. 596, 207 Pac. 369; Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443; Harding v. Harding, 140 Cal. 690, 74 Pac. 284 (reversed on another point in 198 U. S. 317, 49 L. Ed. 1066, 25 Sup. Ct. Rep. 679, see, also, Rose's U. S. Notes; Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208; Crum v. Crum, 38 Cal. App. Dec. 89, 207 Pac. 506; Van Camp v. Van Camp, 35 Cal. App. Dec. 301, 199 Pac. 885; Bennett v. Bennett, 32 Cal. App. Dec. 948, 192 Pac. 180; De Ville v. De Ville, 46 Cal. App. 441, 189 Pac. 297; McNett v. McNett, 44 Cal. App. 778, 187 Pac. 447; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582; Baucom v. Baucom, 25 Cal. App. 108, 142 Pac. 902. See Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016, where it is said that to justify a reversal of the trial court in refusing to grant a divorce, the record should show a great preponderance of evidence against the findings. See APPEAL AND ERROR, vol. 2, p. 918.

5. Percy v. Percy, 63 Cal. Dec. 596, 207 Pac. 369. See supra, § 94.

6. See Berry v. Berry, 145 Cal. 784, 79 Pac. 531 (evidence of resi-

was not guilty of willful desertion,[7] adultery,[8] or habitual intoxication;[9] that the defendant was or was not guilty of extreme cruelty;[10] that the wife was dependent upon the

dence held insufficient); Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 Pac. 784 (evidence of residence held sufficient).

7. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808; Carey v. Carey, 73 Cal. 630, 15 Pac. 313; Dracovich v. Dracovich, 35 Cal. App. Dec. 519, 200 Pac. 44; Young v. Young, 23 Cal. App. 247, 137 Pac. 1065 (desertion by reason of refusal of matrimonial intercourse); Murdough v. Murdough, 23 Cal. App. 179, 137 Pac. 267. See Borden v. Borden, 166 Cal. 469, 137 Pac. 27 (corroborating evidence held insufficient); Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518 (evidence held insufficient); Christie v. Christie, 53 Cal. 26 (evidence held insufficient).

8. Hale v. Hale, 60 Cal. Dec. 551; Koenigstein v. Koenigstein, 35 Cal. App. Dec. 762, 200 Pac. 730, citing Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720; Meyer v. Meyer, 184 Cal. 687, 195 Pac. 387; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402. See Goldsmith v. Goldsmith, 26 Cal. App. 458, 147 Pac. 214, holding that letters of the defendant to the alleged corespondent from which it might be fairly deduced that the relations between the writer and the addressee were of an intimate character do not show the commission of adultery and are insufficient to support a finding thereof.

9. Rose v. Rose, 112 Cal. 341, 44 Pac. 658.

10. Turner v. Turner, 187 Cal. 632, 203 Pac. 109; Brautigam v. Brautigam, 181 Cal. 157, 183 Pac. 529; Lewis v. Lewis, 167 Cal. 732, 52 L. R. A. (N. S.) 675, 141 Pac. 367; Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720; Robinson v. Robinson, 159 Cal. 203, 113 Pac. 155, per Angellotti, J.; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016 (stating that the rule is particularly applicable when the finding is against a divorce); Curl v. Curl, 130 Cal. 638, 63 Pac. 65 (holding that the question whether defendant's conduct had caused plaintiff grievous mental suffering is one of fact for the trial court); Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298 (stating that the findings of the trial court cannot be disturbed on appeal "unless the evidence in support of them is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court"); White v. White, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276 (evidence of firing pistol behind husband by wife many years before he quit living with her held not sufficient to justify a finding of extreme cruelty); Christie v. Christie, 53 Cal. 26 (evidence held insufficient); Johnson v. Johnson, 4 Cal. Unrep. 446, 35 Pac. 637 (evidence held sufficient); Matthai v. Matthai, 49 Cal. 90 (stating that where, in an action for divorce, the wife testifies to acts of personal violence committed by the husband, evidence of the husband attempting to excuse or apologize for such acts will not be regarded as substantially contradicting her); Polakoff v. Polakoff, 34 Cal. App. Dec. 492, 196 Pac. 778 (holding

charity of friends for the common necessaries of life;[11] that a deserting spouse solicited a condonation;[12] that the solicitation was made in good faith;[13] and that one of the parties did or did not condone the offense of the other.[14] The testimony of the defendant alone, if believed by the court, is sufficient to support a finding that he had not been guilty of the offense charged. On the other hand, the testimony of a party with the corroborating testimony of other witnesses is, if believed by the trial court, sufficient to support a finding that the other party was guilty of the offense charged.[15] Where a trial court denies a divorce in a case in which the plaintiff and the de-

that some latitude for the exercise of discretion is permitted to that court in determining what constitutes extreme cruelty, and in the absence of abuse of discretion its finding will stand); Van Camp v. Van Camp, 35 Cal. App. Dec. 301, 199 Pac. 885; Huchting v. Huchting, 46 Cal. App. 194, 188 Pac. 1002; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; Barrow v. Barrow, 42 Cal. App. 50, 183 Pac. 364 (holding that where in an action for divorce on the ground of extreme cruelty it was shown that ten witnesses testified for the plaintiff and but three for the defendant, and that there was a conflict in the evidence, the decision of the trial court in favor of the defendant was not disturbed); Hockerston v. Hockerston, 41 Cal. App. 195, 182 Pac. 325; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Dee v. Dee, 34 Cal. App. 658, 168 Pac. 588; Hubbell v. Hubbell, 7 Cal. App. 661, 95 Pac. 664.

11. Hansen v. Hansen, 27 Cal. App. 401, 150 Pac. 70.

12. Baker v. Baker, 168 Cal. 346, Ann. Cas. 1916A, 854, 143 Pac. 607; Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322; McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554.

13. Baker v. Baker, 168 Cal. 346, Ann. Cas. 1916A, 854, 143 Pac. 607; Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322; McMullin v. McMullin, 140 Cal. 112, 73 Pac. 803; Howard v. Howard, 134 Cal. 346, 66 Pac. 367; McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935; Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751.

In such a case, it has been said, "It is the duty of the wife to test his professions by acceptance, and she cannot capriciously refuse to be satisfied of the good faith of his offer. If he thereafter proves derelict, her complaisance will not prejudice her rights." McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554.

14. Daroux v. Daroux, 35 Cal. App. Dec. 424, 199 Pac. 1112; Stampfli v. Stampfli, 35 Cal. App. Dec. 360, 199 Pac. 829. See Brewthauer v. Brewthauer, 45 Cal. App. 759, 188 Pac. 296, holding evidence insufficient to sustain finding.

15. Baucom v. Baucom, 25 Cal. App. 108, 142 Pac. 902.

fendant both testified in support of the charge, it must be assumed on appeal that the court disbelieved these witnesses, particularly in view of the fact that their testimony alone is made by law insufficient, and weak corroboration was offered where stronger evidence was possible.[16]

§ 129. Harmless and Reversible Error.—As in actions generally, technical errors, and errors which are harmless or do not result in a miscarriage of justice, will not justify a reversal in a divorce action.[17] In view of the fact that a divorce may not be granted upon the uncorroborated admissions or testimony of the parties, it would generally be error for the court to refuse to allow the plaintiff an opportunity to present corroborating testimony. But such error is harmless where the plaintiff's testimony was not sufficient to establish her cause of action, and the testimony of the other witnesses would only corroborate her testimony.[18] While a failure to find upon an issue as to the cause for divorce alleged is reversible error,[19] a failure to make a finding upon an issue which does not result in a miscarriage of justice,[20] or

16. Stedman v. Stedman, 179 Cal. 288, 176 Pac. 437.

17. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 803 (technical error in cross-examination); Benson v. Benson, 29 Cal. App. 37, 154 Pac. 285 (holding that in an action for divorce wherein a decree was granted to the wife upon her cross-complaint alleging extreme cruelty, it is not prejudicial error to refuse to permit her on cross-examination to state whether or not she was willing to go back to her husband and live with him, where it appears from the evidence that such question would have been answered in the negative if allowed, and that both parties had been persistently engaged in an effort to get rid of each other upon what appears to be sufficient reason). See APPEAL AND ERROR, vol. 2, p. 1004 et seq.

18. Hockerston v. Hockerston, 41 Cal. App. 195, 182 Pac. 325.

19. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297. See supra, § 84.

20. Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330, holding that in an action for a divorce on the ground of extreme cruelty, wherein the wife by way of recrimination set up a cause of action in her favor on the same ground, no miscarriage of justice results from the omission to find specifically on the introductory allegation of the wife's cross-complaint that the plaintiff

where the record discloses no evidence on which a finding favorable to the complaining party could properly have been made,[1] is not ground for a reversal. And when the court finds that the plaintiff has a cause of action for divorce, a failure to find in favor of defendant upon certain issues presented by the answer is not prejudicial, where even though the court had found for him thereon, he would not be entitled to a decree.[2] If the judgment is amply supported by findings sustained by the evidence, it is of no consequence that other findings are not sustained.[3] This rule is applicable where several causes of divorce[4] or where several acts of extreme cruelty[5] are alleged and found, some of which are not sustained by the evidence. On reversing a case because of the omission to make or insufficiency of a finding as to residence, in a case in which it is probable the residence was fully established, it is proper to direct the trial court to make a new finding on such subject.[6]

had treated her in an extremely cruel and inhuman manner, where there was no pretense that plaintiff had inflicted bodily injury upon her, and the facts shown disclosed a course of conduct on the part of defendant so reprehensible that the acts of misconduct of plaintiff could not have caused her any mental suffering.

1. Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; White v. White, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276; De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045; Loudon v. Loudon, 46 Cal. App. 599, 189 Pac. 725.

2. Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443; Sweasey v. Sweasey, 126 Cal. 123, 58 Pac. 456.

3. See APPEAL AND ERROR, vol. 2, p. 1028.

4. Percy v. Percy, 63 Cal. Dec. 596, 207 Pac. 369; Avery v. Avery, 148 Cal. 239, 82 Pac. 967; Huellmantel v. Huellmantel, 117 Cal. 407, 49 Pac. 574; Reid v. Reid, 112 Cal. 274, 44 Pac. 564; Dracovich v. Dracovich, 35 Cal. App. Dec. 519, 200 Pac. 44.

5. McKibbin v. McKibbin, 139 Cal. 448, 73 Pac. 143.

6. Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362. See APPEAL AND ERROR, vol. 2, p. 994.

XIII. CUSTODY AND SUPPORT OF CHILDREN.

Custody.

§ 130. In General.—Section 138 of the Civil Code reads as follows:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same."[7]

Under this section a superior court of California, in a divorce action, has full authority to award the custody of minor children when such children are within the jurisdiction of the court,[8] but it has no authority to award custody of children not within its territorial jurisdiction,[9] even though their legal domicile may be in the state of California.[10] The power of the court to act does not depend upon specific allegations as to the fitness of the respective parties, or their ability or willingness, to care for their minor children, or upon a specific prayer for the custody,[11] and it is not necessary that proceedings be instituted under section 1747 et seq. of the Code of Civil Procedure, prescribing the proceedings for the appointment of guardians generally.[12] An order for the custody

7. Civ. Code, § 138. In re Saul, 31 Cal. App. 382, 160 Pac. 695.

8. Matter of McMullin, 164 Cal. 504, 129 Pac. 773; De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; In re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779.

9. Matter of McMullin, 164 Cal. 504, 129 Pac. 773; De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

10. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

11. Ex parte Gordon, 95 Cal. 374, 30 Pac. 561; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260; Ex parte Gordan, 95 Cal. 374, 30 Pac. 561.

12. And see Russell v. Russell, 20

of the children pendente lite can only be made by the court in which the action for divorce is pending.[13] This statute does not, however, confer jurisdiction upon the court to appoint a guardian for the minors, or preclude subsequent proceedings in another county for the appointment of a guardian, the minor having reached the age of fourteen and nominated a guardian.[14] So also the fact that the superior court in a divorce action has made an order providing for the custody of the children does not deprive the same court, sitting as a juvenile court, of jurisdiction to exercise its powers for the disposition of the children under the juvenile court law.[15] On the other hand, the court which awarded the custody of children does not lose jurisdiction to modify its decree, by the fact that in the meantime the children have been removed by their father to another county, and that at the time of the modification an application for letters of guardianship of their persons was pending in the latter county for the sole purpose of sheltering and harboring the children until some permanent arrangement could be effected for their care and custody.[16]

Cal. App. 457, 129 Pac. 467 (stating that the provisions of the Civil Code relating to guardians and wards in nowise control the power of the court, under section 138 of the Civil Code).

13. Bennett v. Southard, 35 Cal. 688, construing section 7 of the act concerning divorces, and holding that in an action for divorce brought by the wife, the judge of the court in which the action is pending has no jurisdiction to hear and determine in the district court of an adjoining county of the same district an application by the wife for an allowance pendente lite, and for the custody of the children of the marriage.

14. Collins v. Superior Court, 35 Cal. App. Dec. 138, 199 Pac. 352. See Guardianship of Murphy, 1 Cof. Prob. Dec., 107, holding that the probate court has no jurisdiction to appoint a guardian for a child who has been awarded to a parent in divorce proceedings, while the divorce court retains the right to control the custody of the child.

15. Dupes v. Superior Court, 176 Cal. 440, 168 Pac. 888. See note, 11 A. L. R. 147, as to effect on jurisdiction of court granting divorce, to control custody of child, as assumption of jurisdiction by juvenile court.

16. Evans v. Evans, 154 Cal. 644, 98 Pac. 1058, distinguishing Younger v. Younger, 106 Cal. 377, 39 Pac. 779.

§ 131. Effect of Adoption.—It is obvious that the jurisdiction and powers conferred by section 138 of the Civil Code must be read and construed with the provisions of the code with reference to adoption. So construed, the jurisdiction conferred by section 138 subsists so long only as the status of a child remains that of a child of the parties.[17] It would, it is said, hardly be contended that the jurisdiction of the divorce court would continue after the death of a child, or after the attainment of its majority, or after the death of its parents. In the first two instances, jurisdiction would wholly cease; and in the last it would devolve upon the court sitting in probate for the care of the orphans. By adoption the child is as entirely removed from the jurisdiction as in either of the instances suggested. Similarly the jurisdiction of the superior court of another county over the adoption proceedings is not affected by the fact that the jurisdiction of the court in which the divorce was granted was first obtained.[18] However, where the superior court merely awards a limited custody to one of the parents, thereby retaining jurisdiction and control of the divorce proceeding in so far as it relates to the care and custody of the children, a subsequent exercise of jurisdiction cannot be defeated by secretly removing the children to another county, and there instituting adoption proceedings, concealing the facts relative to the action of the court granting the divorce, and an adoption order so obtained is fraudulent and will be vacated.[19]

§ 132. To Whom Awarded Generally.—The husband, as the head of the family, has the direction and control of the family, and of family affairs, and his will and judg-

17. In re Darling, 173 Cal. 221, 159 Pac. 606; Younger v. Younger, 106 Cal. 377, 39 Pac. 779. See ADOPTION, vol. 1, p. 427.

18. Younger v. Younger, 106 Cal. 377, 39 Pac. 779.

19. Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403, distinguishing Younger v. Younger, 106 Cal. 377, 39 Pac. 779. See supra, § 5.

ment are paramount to those of the wife, as well in respect to the custody of the children of the marriage as to other things.[20] But after the marriage has been dissolved, the question is different.[1] The rule laid down in the code is that the court in awarding custody of a minor shall be guided first

"By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question"; and, second, "As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father"; and, third, "Of two persons equally entitled to the custody in other respects, preference is to be given as follows: (1) To a parent; . . . "[2]

The code provides also that the father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings, unless, as further provided, they are unable or refuse to take the custody, or have abandoned his or her family, in which cases, as well as for other causes, they should be deemed unfit as such custodians.[3] These provisions should be construed together, and, so read, they contemplate that the natural right of the parent to the care of a minor child, if a fit and proper person, shall prevail as against an entire stranger. In the absence of either evidence or finding showing the contrary, the law presumes that either parent is a proper person to whom its care should be awarded.

20. Wand v. Wand, 14 Cal. 512. See PARENT AND CHILD.

1. Wand v. Wand, 14 Cal. 512.

2. Civ. Code, § 246; Newby v. Newby, 36 Cal. App. Dec. 652, 202 Pac. 891.

3. Civ. Code, § 197; Newby v. Newby, 36 Cal. App. Dec. 652, 202 Pac. 891.

But if the parent is unfit to have the care of the child, the court may award its custody to a stranger.[4]

Divorces are not granted for offenses against children and the bestowal of the custody of a minor in a divorce action is not, unless otherwise provided by statute, an adjudication of the fitness of the parent who is for the time denied the right to retain possession of the child. It is nothing more than the expression of the court's belief that, under the circumstances then existing, the welfare of the child would be best subserved by placing said child with one of the parents rather than the other.[5]

As affected by residence of party.—The home of the husband is the legal domicile of the family, and if he is entitled to the custody of the children, he has the right to select any reasonable place where they shall abide with him. Accordingly, where the court awards the husband the custody of the minor children, it is within its power to direct that the children be cared for by the father where he resides, although the county of his residence is other than that in which the action was tried.[6]

§ 133. Discretion of Court.—The code has not provided explicit rules in regard to the exercise of the trial court's discretion in awarding the custody of the children. It is manifest that the legislature intended to confide to trial courts a very extensive discretion in this respect, with a view to the conservation of the best interests of such minors, and its conclusion will not be set aside in the absence of a clear abuse of that discretion.[7] And this

4. Newby v. Newby, 36 Cal. App. Dec. 652, 202 Pac. 891, citing Guardianship of Mathews, 169 Cal. 26, 145 Pac. 503; In re Mathews, 174 Cal. 679, 164 Pac. 8; In re Campbell, 130 Cal. 380, 62 Pac. 613.

5. Bell v. Krauss, 169 Cal. 387, 146 Pac. 874.

6. Luck v. Luck, 92 Cal. 653, 28 Pac. 787.

7. Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582; Dupes v. Superior Court, 176 Cal. 440, 168 Pac. 888; Black v. Black, 149 Cal. 224, 86 Pac. 505; Dickerson v. Dickerson, 108 Cal. 351, 41 Pac. 475; Luck v. Luck, 92 Cal. 653, 28 Pac. 787; Borgerson v. Borgerson, 38 Cal. App. Dec. 525, 208 Pac. 991; Ibbetson v. Ibbetson, 35 Cal. App.

rule is adhered to, though at the same time it is declared that "naturally and presumptively the mother is entitled to the custody and care of minor children of tender years."[8] The controlling and paramount consideration is the children's welfare.[9] And this the trial court must decide from all the facts of which it has obtained knowledge in a competent manner.[10] The rule which obtains in this class of cases is the same as in other judicial determinations of issues of fact, and similar presumptions and intendments must be indulged. In other words, if there is substantial evidence in the record to support a rational inference that the order is for the best interests of the child, and such evidence does not appear incredible, and there is nothing to impeach the fairness or good faith of the decision, it would be an excess of the appellate authority to disturb the determination of the trial court.[11]

§ 134. Children of Tender Years.—Presumptively the mother is entitled to the custody of children of tender

Dec. 205, 199 Pac. 872; Jones v. Jones, 33 Cal. App. Dec. 81, 192 Pac. 867; Lefebvre v. Lefebvre, 32 Cal. App. Dec. 798, 192 Pac. 76; Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791, Hart, J.; Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260 (holding that in making disposition of the minor children much must be left to the sound discretion of the court in accepting or rejecting evidence.

8. Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253. See infra, § 134.

9. Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582; Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702; Black v. Black, 149 Cal. 224, 86 Pac. 505; Crater v. Crater, 135 Cal. 633, 67 Pac. 1049; Wand v. Wand, 14 Cal. 512; Borgerson v. Borgerson, 38 Cal. App. Dec. 525, 208 Pac. 991; Ibbetson v. Ibbetson, 35 Cal. App. Dec. 205, 199 Pac. 872; Lefebvre v. Lefebvre, 32 Cal. App. Dec. 798, 192 Pac. 76; Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779; Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403; Calegaris v. Calegaris, 4 Cal. App. 264, 87 Pac. 561.

10. Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702; Lefebvre v. Lefebvre, 32 Cal. App. Dec. 798, 192 Pac. 76; Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403.

11. Lefebvre v. Lefebvre, 32 Cal. App. Dec. 798, 192 Pac. 76.

years;[12] but it is for the trial court to say, upon all the evidence whether she is more worthy of such a trust than the father.[13] Where a wife is divorced from her husband for extreme cruelty on his part, and her conduct was without blame, she is entitled to the custody of their female child of tender years, although the husband is entitled to see her at all convenient times.[14] There is no fixed or certain age of minority, which in all cases, and for all purposes, can be said to constitute a child of "tender years" within the statute. And the mere fact that the child is under fourteen is not controlling, though its sex and physical development are to be considered. And it has been held that a boy past ten years old is not of such tender age as imperatively to require the attention of his mother, where it appears that the household of the father, as constituted, may give the needed attention for his attendance at a suitable school under the father's direction.[15]

§ 135. **Award to Guilty Spouse.**—The right to the custody of the children is not by the code necessarily affected by the cause upon which the decree of divorce is based, and it is within the power of the court to give the custody to the guilty party, whatever may be the offense, if in the opinion of the court the awarding of the custody to such parent is for the best interest of the child.[16] Hence it

12. Civ. Code, § 246, subd. 2; Luck v. Luck, 92 Cal. 653, 28 Pac. 787; Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791.

13. Luck v. Luck, 92 Cal. 653, 28 Pac. 787 (presuming, because of the condition of the record on appeal, that the evidence was sufficient to warrant the court in finding that the husband was better qualified than the wife to care for the children); Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791.

14. Wand v. Wand, 14 Cal. 512 (the child in this case was six or seven years of age).

15. Russell v. Russell, 20 Cal. App. 457, 129 Pac. 467.

16. Matter of Cozza, 163 Cal. 514, Ann. Cas. 1914A, 214, 126 Pac. 161; Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403. See note, 4 A. L. R. 1119, as to attempt to bastardize child as affecting right to custody of the child.

may award the custody of children to the father[17] or to the mother,[18] even though it finds that he or she has been guilty of extreme cruelty. So also it may in its discretion give the custody to the mother, though the divorce was granted because of her desertion.[19] All such applications are addressed to the sound and legal discretion of the trial court, and although it may award the care and custody of the children of a marriage to the guilty party, whatever may be the offense, its conclusion will not be disturbed on appeal, unless it should clearly appear that its discretion has been abused.[20] It is true that section 224 of the Civil Code, with reference to the adoption of children, provides that consent to such adoption is not necessary from a father or mother adjudged guilty of cruelty and for such cause divorced, but this section does not undertake, nor is it intended, to modify the other sections of the code dealing specifically with the right of custody.[1]

§ 136. Contract Between Spouses as to Custody of Children.—Parents have a right to contract with each other as to the custody and control of their offspring and to stipulate away their respective parental rights.[2] But this right so to stipulate is subject to the control of the court

17. Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253.

18. Matter of Cozza, 163 Cal. 514, Ann. Cas. 1914A, 214, 126 Pac. 161. See also Russell v. Russell, 20 Cal. App. 457, 129 Pac. 467 (holding that where a decree of divorce was granted to the mother for extreme cruelty on the part of the father and the custody of a boy was, by agreement of the parties, awarded to each of the parties for a portion of each year, it cannot be assumed on appeal that the facts of cruelty were of such a character as to show the father to be an improper guardian of the child).

19. Lampson v. Lampson, 171 Cal. 332, 153 Pac. 238.

20. Black v. Black, 149 Cal. 224, 86 Pac. 505; Lefebvre v. Lefebvre, 32 Cal. App. Dec. 798, 192 Pac. 76; Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403.

1. Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403. See ADOPTION, vol. 1, p. 437, as to the consent of parents to the adoption of their minor children as affected by divorce.

2. Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931; Anderson v. Anderson, 37 Cal. App. Dec. 96, 204 Pac. 426.

in which a divorce action is pending.[3] Where the welfare of children is involved as it is in divorce cases, parents cannot by contract so bind themselves as to foreclose the court from inquiry as to what the child's welfare requires.[4] The court is not required to award the custody in conformity to such stipulation. It does so only because the parents, in view of a judicial separation and solicitous for the welfare of their offspring, have the greatest interest in determining which of them can best care and provide for them in the future, and an agreement prompted by these considerations is generally approved and adopted by the court and made part of the decree. The decree, however, made in pursuance of the agreement, is subject to the power of modification authorized by the statute.[5]

§ 137. Access of Spouse not Entitled to Custody.— From the fact that the custody of a child is awarded to one of the parents it does not follow that the care or protection of the other is to be relinquished, or his parental duties or obligations are destroyed. On the contrary, he has a right to be admitted to see the child at all convenient times when he may desire it. This matter should be settled so as to give the full benefit of parental protection and care to the child, and at the same time give to both parents the comfort of its society.[6]

An order permitting the father to take his children from the mother's home on stated occasions will not be

3. Black v. Black, 149 Cal. 224, 86 Pac. 505; Anderson v. Anderson, 37 Cal. App. Dec. 96, 204 Pac. 426; Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403.

4. Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582; Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702; Anderson v. Anderson, 37 Cal. App. Dec. 96, 204 Pac. 426 (holding that where a defendant in failing to answer relied upon a stipulation had with the plaintiff regarding the custody of a minor child of the parties, which was disregarded by the trial court in awarding the custody in violation thereof, such facts do not entitle the defendant to have a default for failure to answer set aside); Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403.

5. Black v. Black, 149 Cal. 224, 86 Pac. 505, per Lorigan, J.; Russell v. Russell, 20 Cal. App. 457, 129 Pac. 467.

6. Wand v. Wand, 14 Cal. 512.

disturbed on appeal where it appears that the trial court had the parties before it and had the opportunity of interviewing the children in chambers in the absence of their parents, and was therefore able to determine whether such order was best for the welfare of the children. So also an order restraining a wife, to whom the custody of the minor children has been awarded, from criticising the husband before the children or poisoning their minds against him, should not be disturbed on appeal merely upon the ground that it does not appear to be necessary, the matter resting in the sound discretion of the trial court.[7]

§ 138. Effect of Death of Parent Awarded Custody.— It is almost universally held that, upon the death of the parent to whom is awarded the custody of a minor child by the decree divorcing the parents, the other parent becomes entitled to the custody. And such has been the ruling in California.[8] And this result follows although the parent denied custody has been divorced for cruelty and intemperance and adjudged an unfit custodian of his child.[9] The decree, whereby the custody is awarded to the mother, does not absolutely end the father's right to control; it merely determines that, as between the husband and wife, the child should be placed in the custody of the latter until some other disposition should be made.[10] So, it has been held that a mother to whom a decree has awarded the custody of a minor child, has no right to appoint a testamentary guardian thereof, if the father of the child was alive at the time of her death. Such an attempted appointment is entirely without force

7. Ibbetson v. Ibbetson, 35 Cal. App. Dec. 205, 199 Pac. 872.

8. Civ. Code, §§ 197, 246; Code Civ. Proc., § 1751; Pacific Gold Dredging Co. v. Industrial Acc. Com., 184 Cal. 462, 194 Pac. 1; Bell v. Krauss, 169 Cal. 387, 146 Pac. 874; Matter of Allen's Estate, 162 Cal. 625, 124 Pac. 237; Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729.

9. Pacific Gold Dredging Co. v. Industrial Acc. Com., 184 Cal. 462, 194 Pac. 1.

10. Civ. Code, § 138; Matter of Allen, 162 Cal. 625, 124 Pac. 237.

or effect, and does not become operative upon the subsequent death of the father.[11]

§ 139. Award of Custody of Children When Divorce is Denied.—In an action of divorce the question as to the proper custody of the minor children is entirely incidental to the main relief sought, and dependent alone upon the divorce proceedings; and when the action is dismissed or a decree of divorce is denied to both parties the court is not required to make any order as to the care and custody of the minor children.[12] However, it seems that the court may, in its discretion, make an award of the custody of the children even though divorce be denied if the welfare of the children will thereby be best promoted.[13] And it has been expressly held that the court has such powers under section 138 of the Civil Code.[14] The section itself does not state any limitation by which its effect is confined to cases in which divorce is granted; it is designed for the protection of children and should be liberally construed.[15] However, it has been held, where the application of each party for a divorce is denied, and the only findings made are that the allegations and averments of plaintiff's complaint and defendant's cross-complaint have not been proved, and no fact is found that would justify the inference that it is for the best interests of the children that their custody should be awarded to the mother, a judgment awarding such relief must be modified by striking it from the decree, leaving only the decree denying a divorce to both parties.[16]

11. Matter of Allen, 162 Cal. 625, 124 Pac. 237.

12. Gould v. Gould, 63 Cal. Dec. 425, 205 Pac. 1072; Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672.

13. Civ. Code, §§ 136, 138; Luck v. Luck, 92 Cal. 653, 28 Pac. 787; In re Saul, 31 Cal. App. 382, 106 Pac. 695; Bensen v. Bensen, 20 Cal. App. 462, 129 Pac. 596.

14. In re Saul, 31 Cal. App. 382, 106 Pac. 695.

15. In re Saul, 31 Cal. App. 382, 106 Pac. 695, citing Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32.

16. Benson v. Benson, 20 Cal. App. 462, 129 Pac. 596.

§ 140. Modification of Award Generally.—It is well established that in divorce proceedings the court has the power to vary and modify its decree as to the custody of the minor children from time to time, as circumstances change;[17] even though the original decree was made in accordance with a stipulation of the parties.[18] The court, in revising and modifying its decree, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child.[19] The

17. Civ. Code, § 138; Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582; Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702 (holding an answer by the father, in response to a citation issued in a proceeding by the mother to regain the custody of a child in accordance with the judgment of divorce, to be in substance, an application for the modification of the judgment respecting the custody of the child, and therefore should not be stricken out); Black v. Black, 149 Cal. 224, 86 Pac. 505; De Lemos v. Siddall, 143 Cal. 313, 76 Pac. 1115; Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Crater v. Crater, 135 Cal. 633, 67 Pac. 1049; Luck v. Luck, 92 Cal. 653, 28 Pac. 787; Anderson v. Anderson, 37 Cal. App. Dec. 96, 204 Pac. 426 (holding that a defendant was not prejudiced by the action of the trial court in refusing to be bound by a stipulation of the parties with respect to the custody of a minor child, since by a proper showing of fitness the decree might be modified at any time during the minority of the children); Jones v. Jones, 33 Cal. App. Dec. 81, 192 Pac. 867; Lefebvre v. Lefebvre, 32 Cal. App. Dec. 798, 192 Pac. 76; Ewing v. Ewing, 46 Cal. App. 446, 189 Pac. 304 (holding that an order of the trial court in divorce proceedings taking from the mother the custody of her child and awarding it to the father, will not be disturbed where such order is based on conflicting evidence, particularly where it is shown that the mother has been guilty of misconduct); Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Russell v. Russell, 20 Cal. App. 457, 129 Pac. 467; Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260.

18. Black v. Black, 149 Cal. 224, 86 Pac. 505 (distinguishing Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931); Russell v. Russell, 20 Cal. App. 457, 129 Pac. 467. See supra, § 135, as to agreements for custody of children.

19. Crater v. Crater, 135 Cal. 633, 67 Pac. 1049; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791 (holding that if the judge who hears the motion for an order modifying the decree of divorce, so as to change the custody of the child, heard and decided the divorce action, he may consider not only the evidence adduced on the hearing of the motion, but also the evidence taken at the trial of the action).

good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this rather than to the whims and caprices of the parties.[20] The morals of the parents, their financial condition, their subsequent marriage, the age of the child, and the devotion of either parent to its best interests are all factors to be weighed and considered by the court. All such applications are addressed to the sound legal discretion of the trial court, and its conclusion will not be disturbed on appeal, unless the record presents a clear abuse of that discretion.[1] Thus, it has been held that where a decree of divorce has awarded the custody of a minor child to the mother, it is not an abuse of discretion for the court subsequently to modify the decree by awarding the custody to the father, where it appears that the divorce was granted to him because of the improper conduct of the mother with a man whom she thereafter married.[2]

Findings.—Because of the fact that the court in a divorce action has a discretion to award custody of children, even in the absence of allegations with reference thereto in the complaint,[3] it has been concluded that findings are not essential to support an award of their custody. At all events, a waiver of findings in the action will extend to findings on such order.[4]

20. Crater v. Crater, 135 Cal. 633, 67 Pac. 1049; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791.

1. Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582; Black v. Black, 149 Cal. 224, 86 Pac. 505; Crater v. Crater, 135 Cal. 633, 67 Pac. 1049; Dickerson v. Dickerson, 108 Cal. 351, 41 Pac. 475; Borgerson v. Borgerson, 38 Cal. App. Dec. 525, 208 Pac. 991; Jones v. Jones, 33 Cal. App. Dec. 81, 192 Pac. 867; Lefebvre v. Lefebvre, 32 Cal. App. Dec. 798, 192 Pac. 76; Ewing v. Ewing, 46 Cal. App. 446, 189 Pac. 304; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Russell v. Russell, 20 Cal. App. 457, 129 Pac. 467; Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260.

2. Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791.

3. See supra, § 130.

4. Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791.

§ 141. **Effect of Appeal.**—Pending an appeal from a judgment of divorce which includes a judgment awarding the custody of the minor children, the trial court has no jurisdiction to change or modify the judgment as to the custody of the children.[5] An appeal from an order modifying a decree of divorce, in so far as it awards the custody of the minor children, suspends and stays all proceedings under the modifying order, and deprives the trial court of jurisdiction to enforce it by contempt proceedings.[6] But where, after modification of the decree, the order is complied with, a subsequent stay bond on appeal from the modifying order is ineffectual, and does not entitle the parent to the return of the child pending such appeal.[7]

§ 142. **Extraterritorial Effect of Judgment Awarding Custody.**—Judgments relating to the custody of children have no extraterritorial force,[8] and, contrary to the general rule with respect to judgments, are not conclusive, even as evidence, in another state.[9] No person has an absolute right to such custody, for the welfare of the third party—the minor—is always an open and paramount question, and courts of another state may, and will, award the custody of minors, regardless of such judgments.

5. Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473; In re Dupes, 31 Cal. App. 698, 161 Pac. 276. See APPEAL AND ERROR, vol. 2, p. 415, as to the effect of a perfected appeal generally.

6. Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956.

7. De Lemos v. Siddall, 143 Cal. 313, 76 Pac. 1115, distinguishing Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473, and Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956. See APPEAL AND ERROR, vol. 2, p. 469.

8. Matter of McMullin, 164 Cal. 504, 129 Pac. 773; De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779; In re Culp, 2 Cal. App. 70, 83 Pac. 89 (McLaughlin, J., concurring). See note, 20 A. L. R., p. 815, as to extraterritorial effect of provision in decree of divorce as to custody of child.

9. In re Culp, 2 Cal. App. 70, 83 Pac. 89 (McLaughlin, J., concurring). See JUDGMENTS, as to the general rule as to extraterritorial effect of judgments.

The courts of California, therefore, as parens patriae to a minor child, may award its custody, notwithstanding a judgment of a sister state.[10] It is fundamental that a decree of this kind can only be made by a court having jurisdiction of the child, or continue operative while the child "remains within the jurisdiction."[11] But if the child is within the jurisdiction, the courts of the state are not precluded by any judgment or order of a sister state from inquiring into and determining in its own behalf what are the best interests of the child.[12] And this is, a fortiori, true if the child was not within the jurisdiction of the foreign court at the time the decree was rendered.[13] However, the doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child. Hence upon an application for a writ of habeas corpus to recover the custody of a minor child brought into California by a parent, in direct violation of the terms of a decree of a court of competent jurisdiction of another state, a due respect for comity requires the courts of California to recognize the right of the petitioner under such decree, in the absence of any showing that since the entry of the decree the petitioner had become an unfit person to have control of the minor.[14]

10. Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779; In re Culp, 2 Cal. App. 70, 83 Pac. 89 (McLaughlin, J., concurring).

11. Matter of McMullin, 164 Cal. 504, 129 Pac. 773; De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345; Id., 112 Cal. 131, 44 Pac. 354; Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779; Davis v. Fisher, 34 Cal. App. 137, 166 Pac. 833; In re Culp, 2 Cal. App. 70, 83 Pac. 89 (McLaughlin, J., concurring).

12. Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779.

13. In re Culp, 2 Cal. App. 70, 83 Pac. 89 (McLaughlin, J., concurring).

14. In re Wenman, 33 Cal. App. 592, 165 Pac. 1024.

Support and Maintenance.

§ 143. In General.—Section 138 of the Civil Code, heretofore quoted,[15] authorizes the court to make full provision for the support and maintenance of the minor children of the marriage.[16] In addition the code provides as follows:

"Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."[17]

"Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them."[18]

It will be noted that section 139 declares the power of the court where a divorce is granted for an offense of the husband, to compel him to provide for the maintenance of the children of the marriage. But it appears that under section 138 like power exists in all divorce cases and at all stages of the proceedings.[19] Whether the husband is with or without fault in the matters involved it is primarily his duty to support his minor children;[20] and it has been held that the court may compel him to do so though the child is given to the custody of the guilty

15. See supra, § 130.

16. Pacific Gold Dredging Co. v. Industrial Acc. Com., 184 Cal. 462, 194 Pac. 1; People v. Champion, 30 Cal. App. 463, 158 Pac. 501. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 939, for full discussion of the subject of alimony and separate maintenance for the support of the wife and children.

17. Civ. Code, § 139. Pacific Gold Dredging Co. v. Industrial Acc. Com., 184 Pac. 462, 194 Pac. 1.

18. Civ. Code, § 136; Anderson v. Anderson, 124 Cal. 48, 71 Am. St. Rep. 17, 56 Pac. 630, 57 Pac. 81.

19. People v. Champion, 30 Cal. App. 463, 158 Pac. 501, per Conrey, P. J.

20. Lampson v. Lampson, 171 Cal. 332, 153 Pac. 238; Ex parte Gordan, 95 Cal. 374, 30 Pac. 561.

mother,[1] or of a stranger to the action.[2] While a wife may abandon or forfeit her own claims to be supported by or from the estate of her divorced husband, she cannot forfeit or abandon the claims of the children, so that whether or not she is at fault is immaterial.[3] It will be noted also that the father's duty toward his children is merely to maintain them during their minority. As each child attains his majority, that duty will terminate.[4] Under section 136 of the Civil Code, the court on denying a divorce may provide for the maintenance of the children.[5] The word "children" herein includes an adult daughter who is an invalid and dependent on the mother's care. Although an allowance is made under this section for the maintenance of a minor, whose custody was not awarded to the mother, the father cannot complain while the minor is in the mother's custody and is supported by her.[6]

The power of the court to make orders for the support of minor children must be held to be limited to the conditions and circumstances existing at the time they are made. The court cannot then anticipate what may possibly thereafter happen, and provide for the future contingencies. For example, the court, in making its orders for the custody and support of a minor, cannot anticipate that the mother might possibly die during the minority of the child, and that a guardian of the child other than the father might thereafter be appointed, and then proceed to direct that the allowance made to the mother for the

1. Lampson v. Lampson, 171 Cal. 332, 153 Pac. 238.

2. Ex parte Gordan, 95 Cal. 374, 30 Pac. 561.

3. Evans v. Evans, 154 Cal. 644, 98 Pac. 1044; Ex parte Gordan, 95 Cal. 374, 30 Pac. 561.

4. Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868. See note, 15 A. L. R. 781, as to wife's possession of independent means as affecting her right to allowance for support of her children.

5. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 1019.

6. Anderson v. Anderson, 124 Cal. 48, 71 Am. St. Rep. 17, 56 Pac. 630, 57 Pac. 81. See note, 8 A. L. R. 651, as to right of wife to dispose of property awarded to her as support for herself and child.

support of the child should be paid to such guardian. Upon the death of the mother the father again becomes entitled to the custody of the child, and this right continues until a guardian of its person is appointed. After that he is under no obligation to furnish support to the child other than such as the law imposes upon him.[7]

§ 144. Effect of Agreement of Parties.—The authority of the court to make necessary orders for the maintenance and support of the minor children of the marriage is conferred by statute and its exercise cannot be limited or abridged by the parties.[8] And a contract between the parents pending an action for divorce, whereby they undertake to limit the obligation of the father with respect to the support of a child, does not bar the right of the child to have an order for proper support.[9] Nor does an agreement of the parties that the wife should receive a sum certain as her part of the common property, which should be in full for her allowance for the support of a child, deprive the court of its power afterwards to make such order for the maintenance and education of the child as it might deem just and for his interest and welfare.[10] So also the authority of the court to modify a decree in a proper case, and to provide when necessary that the husband shall discharge his paramount duty in caring for and defraying the expense of educating his children cannot be divested by a stipulation of the par-

7. Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729. See supra, § 137, as to the right of a surviving parent to the custody of a child awarded to the deceased parent.

8. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42; Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9; Wilson v. Wilson, 45 Cal. 399.

9. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42.

10. Wilson v. Wilson, 45 Cal. 399. See, however, Rolleri v. Rolleri, 33 Cal. App. 233, 164 Pac. 817, holding that there is no abuse of discretion in the court's denying an application for an allowance from the husband for the support of the child, where it appeared that the wife still had on hand most of the money received in the settlement, which was in a form available for the support of the child, and it further appeared that the husband had fully performed the contract.

ties.[11] Any proper modification of the decree, in the interest of the child, may be ordered on the application of the mother herself, even though she had agreed that the father should not be required to contribute further.[12] If the mother should fail to pursue the remedy, there is no doubt that the child's interest is such that the power to make adequate provision for it may be invoked by a proper representative of the child itself, or may be exercised by the court of its own motion.[13]

A previous understanding or agreement is not admissible to vary or modify a decree of divorce or to change the rights of the parties as determined thereby.[14] And a stipulation of the parties to an action for divorce cannot divest the parents, as against the children, of the duty of maintaining them. Yet where the stipulation supports and upholds the decree, and is tantamount to an agreed statement of facts, upon which that portion of the decree relating to property rights and the custody, maintenance and education of the children was based, the stipulation is admissible in evidence against the mother, upon her application to modify the decree so as to require the father to maintain the children contrary to the stipulation.[15]

§ 145. Liability of Father Where Custody is Awarded to Mother.—It is established law that where in a decree of divorce the father is deprived of the custody of a minor child and no order is made requiring him to contribute toward his or her support, the whole duty of furnishing maintenance to the child rests on the mother; particularly where the mother is able to do so,[16] it being expressly

11. Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9.

12. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42; Black v. Black, 149 Cal. 224, 86 Pac. 505; Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9; Wilson v. Wilson, 45 Cal. 399.

13. Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9; Ex parte Gordan, 95 Cal. 374, 30 Pac. 561.

14. Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9; Wilson v. Wilson, 45 Cal. 399.

15. Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9.

16. It may be of interest to note

provided that "the parent entitled to the custody of a child must give him support and education suitable to his circumstances."[17] And if the decree directs the payment of specified amounts, the father is under no obligation to provide for such child any support or education beyond that which may be directed by the court which has granted the divorce, either in its decree or by subsequent modification.[18] Accordingly, he is not liable to prosecution, under section 270 of the Penal Code, upon a charge of willfully failing to furnish necessary food, clothing, shelter or medical attendance for his infant child, where the infant had been given into the custody and control of the mother in a divorce action, without a requirement that the father contribute to its support, and no showing is made that its legal custodian was not able to care for it.[19]

that in the cases cited (except perhaps the Lewis case), particularly where it was declared that divesting of custody without requirement for support in a divorce action freed the offending parent of obligation to contribute, it was assumed and not contrarily alleged that the wife had means, if she wished so to employ them, with which to care for the minors left in her custody. And it has been said that, regardless of the legal relations between husband and wife after divorce decree limiting or restricting their liability toward each other, support may be enforced in favor of a minor child from the father where the mother is left without means and is wholly unable properly to care for or educate her child. Davies v. Fisher, 34 Cal. App. 137, 166 Pac. 833, per James, J.

17. Civ. Code, § 196; Pacific Gold Dredging Co. v. Industrial Acc. Com., 184 Cal. 462, 194 Pac. 1; Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42; Matter of McMullin, 164 Cal. 504, 129 Pac. 773; Selfridge v. Paxton, 145 Cal. 713, 79 Pac. 425; McKay v. McKay, 125 Cal. 65, 57 Pac. 677; Ex parte Miller, 109 Cal. 643, 42 Pac. 428; In re Perry, 37 Cal. App. 189, 174 Pac. 105; Davies v. Fisher, 34 Cal. App. 137, 166 Pac. 833; People v. Champion, 30 Cal. App. 463, 158 Pac. 501; People v. Hartman, 23 Cal. App. 72, 137 Pac. 611. See note, 15 A. L. R. 569, as to liability of father for support of children awarded to mother by decree of divorce not providing for maintenance, wherein the California rule is said to be the minority one.

18. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42, holding that a minor daughter cannot compel her father to contribute to her support where a decree of divorce gave the custody of the plaintiff to the mother and made no provision for plaintiff's support, beyond a requirement for the payment by the defendant of sums which had been fully paid.

19. Matter of McMullin, 164 Cal. 504, 129 Pac. 773 (reversing same case, In re McMullen, 19 Cal. App.

And a third party furnishing such child with the necessaries of life, with a knowledge of the facts, must look to the parent in charge of the minor for recovery therefor.[20] However, the court in an action for divorce has power to compel the father to support his children, even though he is deprived of their custody;[1] and where a decree of divorce contains a valid provision requiring the father to continue to contribute to the support of a minor child whose custody is awarded to the mother, he may be convicted, under section 270 of the Penal Code, if he willfully fails to do so.[2] And the fact that he is imprisoned for failure to do so does not constitute imprisonment for debt in a civil action, within the meaning of the constitution, although the order for support was made by his consent, as the order derives its force from the power of the court and not from contract.[3]

§ 146. Right to Make Order Subsequent to Decree.— When a superior court has made a decree of divorce, and has not, in the decree itself, reserved jurisdiction to make a supplemental decree, its only power to make further orders affecting the property rights of the parties after the decree has become final is that declared in the Civil Code, it being without inherent power in the matter.[4] While section 139 of that code, relating to divorces granted

481, 126 Pac. 368); In re Perry, 37 Cal. App. 189, 174 Pac. 105; People v. Hartman, 23 Cal. App. 72, 137 Pac. 611.

20. Selfridge v. Paxton, 145 Cal. 713, 79 Pac. 425 (holding that where, by the decree of divorce, the custody of an infant child of the parties was awarded to the mother, the father, who had not contracted for necessary surgical services rendered to the child, is not liable therefor to a surgeon who knew of the decree and of the award of the custody of the child to the mother); McKay v. McKay, 125 Cal. 65, 57 Pac. 677; Ex parte Miller, 109 Cal. 643, 42 Pac. 428 (concurring opinion of Temple, J.).

1. See supra, § 142.

2. People v. Schlott, 162 Cal. 347, 122 Pac. 846; Ex parte Miller, 109 Cal. 643, 42 Pac. 428; People v. Champion, 30 Cal. App. 463, 158 Pac. 501.

3. People v. Champion, 30 Cal. App. 463, 158 Pac. 501. See ARREST, vol. 3, p. 140.

4. Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32; McKay v. McKay, 125 Cal. 65, 57 Pac. 677.

for an offense of the husband, authorizes the court at any time to modify an order making provision for maintenance or support, it does not authorize the making of any order after final judgment where the decree itself contains nothing on the subject of maintenance of children.[5] Section 138 is not and has never been so limited, however. The rule that no liability to support a child attaches to a parent who has been deprived of its custody and charge does not mean that the natural duty of a father to provide for his minor child is finally and absolutely terminated by an award of the custody of the child to the mother, without provision for support by him. Where such an award is made by a decree of divorce, or in an action for custody of children without divorce, the court, under section 138 of the Civil Code, may provide, at any time during the minority of the children, for their support and education by the father who is deprived of their custody, even though the judgment may have contained no provision on the subject.[6]

Prior to 1905 section 138 of the Civil Code provided only for orders relating to the "custody, care and education" of the children, but by an amendment in that year, the legislature expressly included "maintenance and sup-

5. Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32; Howell v. Howell, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770.

6. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42; Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32 (where the cases on this point are reviewed and the question put at rest in an able opinion, per Sloss, J.); Evans v. Evans, 154 Cal. 644, 98 Pac. 1044; McKay v. McKay, 125 Cal. 65, 57 Pac. 677; McKay v. Superior Court, 120 Cal. 143, 40 L. R. A. 585, 52 Pac. 147; Malvich v. Malvich, 34 Cal. App. Dec. 450, 196 Pac. 784 (holding that although both the interlocutory and final decrees awarded all the community property of the parties to the plaintiff, and made no provision or reservation for the support of the minor children of the marriage, the court had power six years after the entry of the final decree to modify it by providing that the defendant pay to the plaintiff a monthly sum for the support of the children during minority); Davies v. Fisher, 34 Cal. App. 137, 166 Pac. 833; In re Saul, 31 Cal. App. 382, 160 Pac. 695. And see Wilson v. Wilson, 45 Cal. 399 (construing similar provision).

port" of children among the enumeration of the objects to be provided for by order made at, before or after the hearing of an action for divorce. It seems clear, however, that the same intention had been declared by the section prior to the amendment, for it has been said that the power to give directions for the "custody, care, and education" of the children of the marriage, vested in the court involves the right, not merely to declare who shall have the custody, and what shall be the nature of the care and education of the children, but also, by necessary implication, to require the payment, by one of the parties, of such sums as may be necessary in properly carrying out the objects contemplated by the statute.[7] Prior to the amendment of 1905 it was held that the court should not, by an order made in such a case, compel the husband to reimburse the wife or a third party for past expenditures incurred for the benefit of the children.[8] But under a statute similar to the present section 138 it has been held that the court might order an allowance for past as well as future support.[9] So also it has been held that upon appeal from an order after decree of divorce directing a payment by the father for the maintenance of children awarded to the custody of the mother, the court has jurisdiction to compel the father to pay an allowance for attorney's fees and costs of printing to the mother as

7. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42; Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32, overruling Shattuck v. Shattuck, 135 Cal. 192, 67 Pac. 45, and stating that it is probable that the decision in that case was thought to make the amendment necessary in order to give effect to the real intention of the legislature. The Shattuck case held that where a decree of divorce makes no provision for the maintenance of the children of the marriage, the court is without jurisdiction subsequently to make any order compelling either party to pay the other for such maintenance.

The decision in Calegaris v. Calegaris, 4 Cal. App. 264, 87 Pac. 561, as to the power of the court under section 138, prior to the amendment of 1905, is in conflict with Harlan v. Harlan, supra, and must be deemed to have been overruled by the later case.

8. McKay v. McKay, 125 Cal. 65, 57 Pac. 677.

9. Wilson v. Wilson, 45 Cal. 399, construing section 7 of the act concerning divorces.

guardian of the children, to the end that they may properly respond upon the appeal.[10]

§ 147. Amount of Award—Sufficiency of Order.—The amount to be awarded for the care, support, education and maintenance of the children awarded to the custody and care of the wife is within the discretion of the trial court.[11] It should be such an amount as may be reasonably required to support and maintain the children in a manner consistent with the parent's circumstances and earning ability.[12] The court may in its discretion make an allowance for the child's traveling expenses.[13]

Sufficiency of order.—If the custody is awarded to a stranger, the court may direct the payments to be made directly to such stranger, and such an order will be upheld as an order for the payment of money to an agent or officer of the court charged with the duty of carrying its decree into effect.[14] An error in the name of the child is not fatal if the child is sufficiently identified.[15] Under

10. McKay v. Superior Court, 120 Cal. 143, 40 L. R. A. 585, 52 Pac. 147.

11. Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582.

12. Rogers v. Rogers, 3 Cal. Unrep. 559, 31 Pac. 157 (holding a monthly allowance of twenty dollars for the support of a son not excessive); Stampfli v. Stampfli, 35 Cal. App. Dec. 360, 199 Pac. 829 (holding that an allowance of fifteen dollars a month for each of two children and an allowance of thirty dollars a month for the wife was proper where the husband was making in excess of one hundred dollars a month); Benson v. Benson, 29 Cal. App. 37, 154 Pac. 285 (holding that an allowance of fifteen dollars per month to each of three minor children is not unreasonable as against the father, where he is shown to be a carpenter and building contractor, earning good wages, and usually employed).

13. Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582.

14. Ex parte Gordan, 95 Cal. 374, 30 Pac. 561.

15. Ex parte Gordan, 95 Cal. 374, 30 Pac. 561, holding that an order that the husband pay a monthly allowance for the support of a minor child designated as "Lima" or "Lena" Gordan is not void as being an order for the support of a different person from "Leah" Gordan, where the child so variously designated is sufficiently identified throughout the proceedings by other terms of description, e. g., the sole issue of the marriage of the parties.

the former statute authorizing the court to give directions for the "custody, care and education" of the children, an order couched in such terms was held valid and within the jurisdiction of the court, though it did not give separate specific directions regarding the manner of such custody, care or education.[16]

§ 148. Modification of Allowance.—Under sections 138 and 139 of the Civil Code the court in actions for divorce is vested with a continuing jurisdiction, in so far as are concerned the care, custody, maintenance and education of minor children, and it "may at any time modify or vacate" orders with reference thereto.[17] Thus where by a decree of divorce the custody of the minor children was given to the defendant husband, subject to the further order of the court, and he was required to maintain and educate them, the court rendering the decree has the power subsequently to award the custody of the children to their mother, and to order the husband to pay a monthly allowance for their maintenance.[18] On the other hand, where the mother has remarried after being

16. Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32, per Sloss, J. Compare Calegaris v. Calegaris, 4 Cal. App. 264, 87 Pac. 561, holding that where it appeared that the minors were in plaintiff's custody, attending the public schools, and there was no showing that the plaintiff, to whom $30,000 worth of property had been awarded by the decree, did not have ample means to provide for their support and future education, an order directing further monthly payments by defendant to plaintiff therefor, without any provision as to their education, and leaving the whole matter discretionary with her, was improvident, and showed an abuse of discretion, under the circumstances of the case. However, it is therein stated, that if the conditions of the parties had changed materially after the decree, or if the means allowed to plaintiff had been exhausted, or if the circumstances had been such as to call for aid from defendant to assist in the education of the minors, the question would have been different.

17. Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582; Evans v. Evans, 154 Cal. 644, 98 Pac. 1044; Crater v. Crater, 135 Cal. 633, 67 Pac. 1049; Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791. See supra, § 139.

18. Evans v. Evans, 154 Cal. 644, 98 Pac. 1044.

awarded the custody of a child, the court may, in its subsequent order changing the custody to the father, absolve him from the payment of money to the mother for the support of the child, for it is evident that the money paid for the support of the child by the father should be used for its support, and not for the support of a new family acquired by the mother after the divorce.[19] And the power of the court to do this cannot be divested by a stipulation of the parties.[20]

§ 149. Liability of Deceased Father's Estate.—The weight of authority is to the effect that the liability of the father for the support of his minor children is not necessarily terminated by his death, but may survive against his estate as to subsequently accruing installments.[1] Of course, there is no question as to the estate's liability for installments already accrued at the death of the father, and it has been held that a minor after becoming of age has no power to release the estate of the father from liability under an order for support, and the mother is entitled to reimbursement for support furnished from her own resources.[2]

§ 150. Enforcement of Liability.—The court, in executing the provisions of the code relating to maintenance, must resort, first, to the community property, and then to the separate property of the husband,[3] although

"The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just."[4]

The code provides that the court may require the husband to give reasonable security for providing such maintenance, and may enforce the same by the appointment of

19. Crater v. Crater, 135 Cal. 633, 67 Pac. 1049; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791.
20. See supra, § 143.
1. 9 Ruling Case Law, 485.
2. Saunders v. Simms, 183 Cal. 167, 190 Pac. 806.
3. Civ. Code, § 141.
4. Civ. Code, § 143.

a receiver, or by any other remedy applicable to the case.[5] It does not confer power to transfer title to real or personal property, but limits the power of the court to making an allowance in money.[6] However, the court has authority to award to the wife a gross sum for the support of herself and children and make the allowance a lien on the husband's lands.[7] Such a decree is clearly supported by the provisions of section 140 of the Civil Code, herein quoted.[8]

It has been held that the refusal of the husband to pay money for the support of a minor child is a contempt of court, punishable by imprisonment until the money is paid, if the husband is found to have the ability to do so. There is no distinction in principle between orders for the payment of alimony to the wife and orders to pay money for the support of minor children; and it is settled in California that refusal to pay alimony is a contempt of court punishable by imprisonment, or, what is the same thing in effect, that a party found to have the ability to pay may be imprisoned until he obeys.[9]

Under section 685 of the Code of Civil Procedure, where a valid order has been made after final judgment in an action for divorce, requiring the husband to pay to the wife at stated intervals a sum of money for the support, education and maintenance of their minor children, the court has power, at any time after the entry of the order, to order execution to issue for the amount unpaid. And the mere fact that the wife has allowed ten years to elapse

5. Civ. Code, § 140.

6. Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868.

7. Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095; Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868.

8. Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868. And see Huellmantel v. Huellmantel, 117 Cal. 407, 49 Pac. 574; S. C., 124 Cal. 583, 57 Pac. 582; Gaston v. Gaston, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609. See also ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 1046.

9. Ex parte Gordan, 95 Cal. 374, 30 Pac. 561, citing Ex parte Perkins, 18 Cal. 60; Ex parte Cottrell, 59 Cal. 417. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 1057.

without making any effort to compel payment does not show any abuse of discretion by the court in ordering execution to issue. A subsequent motion by the husband to vacate the order for the allowance to the wife and the order directing execution to issue thereon, is a collateral attack and on an appeal from an order denying such motion the appellant is limited to the single contention that the court, in making the order of allowance, exceeded its jurisdiction, and that, in consequence, the order itself is void.[10]

§ 151. **Action to Obtain Award.**—It has been declared that the obligation of the father deprived of the custody of his minor child under a divorce decree which awards its custody to the mother and makes no provision for its support, is one to be enforced by the court which granted the divorce, and in the divorce action itself. Accordingly, it has been held that a separate action by the child against the father to compel him to furnish support and education will not lie.[11] However, a different rule seems to apply where it appears that a judgment of divorce has been rendered in another state and the facts are such that had it been rendered in California, the mother would have had the right in the action to move for modification of the judgment and obtain, if the circumstances warranted, an order requiring the father to contribute to the support of the minor children of the parties. The conclusiveness of a foreign decree does not prevent the maintenance of such action.[12]

10. Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32. See EXECUTIONS.

11. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42. But see Calegaris v. Calegaris, 4 Cal. App. 264, 87 Pac. 561, stating that if no provision in reference to the children is made in the original judgment, but, by reason of their necessities, or for the protection of their interests, any judicial action is required in their behalf, it may be sought in an independent proceeding therefor.

12. Davies v. Fisher, 34 Cal. App. 137, 166 Pac. 833. And see Matter of McMullin, 164 Cal. 504, 129 Pac. 773 (where such a remedy is suggested as applicable in such a case).

XIV. FOREIGN DIVORCES.

§ 152. In General.—The federal constitution requires each state to give "full faith and credit" to the public acts, records and judicial proceedings of every other state.[13] As between the states of the Union, therefore, a divorce decreed in one will ordinarily be given effect in every other. Accordingly, a decree of divorce which has been regularly obtained in one state by a citizen thereof against a nonresident defendant constructively served by publication of the summons, and without other notice, and which decree is valid and effectual in the state in which it was rendered, is equally valid in California.[14] The requirement of full faith and credit extends equally to decrees rendered by consent of the parties and to decrees in invitum.[15] With respect to the validity of a divorce as between a state of the Union and a foreign country the rules of international law come into play. And so it has been held that a judgment of divorce rendered in a foreign court in pursuance of a statute thereof permitting the guardian of an incompetent husband to maintain an action for divorce against the wife, must by comity, be given full force and effect by the courts of California.[16]

§ 153. Jurisdiction of Parties.—Since a suit for divorce is a proceeding in rem to dissolve the marriage status, it is clear that the courts of the state where suit is brought

13. Const. U. S., art. IV, § 1. See JUDGMENTS.

14. In re James' Estate, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; Steinbroner v. Steinbroner, 30 Cal. App. 673, 159 Pac. 235.

15. Harding v. Harding, 198 U. S. 317, 49 L. Ed. 1066, 25 Sup. Ct. Rep. 679, reversing 140 Cal. 690, 74 Pac. 284.

16. McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103, holding, further, that the construction given by the courts of the Republic of Hawaii to a statute of that republic, to the effect that it permits an action for a divorce to be maintained by the guardian of an incompetent person, cannot be assailed to defeat a judgment of divorce granted thereunder.

must have jurisdiction of the res in order to give the divorce extraterritorial effect. It is not necessary to the jurisdiction of the court, however, that both parties be within the state. The marriage relation is a status transitory in nature and attached to the person of each of the contracting parties, so that a court having jurisdiction over the one bona fide domiciled in the state, may dissolve it, notwithstanding the other is beyond such jurisdiction and is given constructive notice as authorized by the laws of the state of the forum.[17] A judgment so obtained is valid and is entitled to recognition in another state[18] unless the record affirmatively shows that the statutes have not been complied with.[19] If, however, the court rendering the decree expressly recites in the decree that the summons was served upon the nonresident spouse in the manner provided by statute, it will be presumed upon a collateral attack in another state that the statute was complied with.[20] But such recital can be impeached by a bare preponderance of evidence inconsistent with it.[1]

§ 154. Domicile or Residence.—It is well settled that each state has exclusive jurisdiction over the marriage status of its citizens, and that the courts of another have no jurisdiction over a cause of divorce, wherever the offense may have been committed, if neither of the parties has an actual bona fide domicile within its territory.[2]

17. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Steinbroner v. Steinbroner, 30 Cal. App. 673, 159 Pac. 235.

18. In re James' Estate, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; Estate of Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; Steinbroner v. Steinbroner, 30 Cal. App. 673, 159 Pac. 235.

19. Estate of Hancock, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58.

20. Estate of Pusey, 177 Cal. 367, 170 Pac. 846.

1. Estate of Pusey, 180 Cal. 368, 181 Pac. 648.

2. Bennett v. Bennett, 28 Cal. 599; Steinbroner v. Steinbroner, 30 Cal. App. 673, 159 Pac. 235 (holding that in an action for divorce a defense based upon a decree dissolving the marriage in a foreign state antedating the action cannot be sustained where the law of the foreign state provided that the applicant must be a bona fide

And where one spouse goes to a state other than that of the matrimonial domicile and there obtains a divorce under a residence simulated for that purpose and not in good faith, the judgment is not binding upon the courts of other states of the Union, and upon proof of the fraudulent residence and of the fact that the divorce is obtained by substituted service only, it may be held void in any other state than that in which it was rendered.[3] Whether it would be held valid in the state in which it was rendered is a question depending upon the policy and law of that state.[4] However, the invalidity of such decree is not due to any vice apparent upon the record, but to the policy of the state of California which refuses faith and credit to such a decree. And if the wife accepts the status given to her by such decree, and marries another person, she is precluded from setting up its invalidity and from claiming marital rights against her former husband.[5]

§ 155. Doctrine of Haddock v. Haddock.—In the well-known case of Haddock v. Haddock, the rule is laid down that a husband who, without cause, abandons his wife and takes up his residence in a state other than that of their residence, thereby changes the matrimonial domicile to the state of his new residence, so that a divorce granted in that state on his complaint and upon constructive service only may be valid in that state, as an adjudication of the res, the res being the marriage relation, but that he does not thereby carry the entire relation to that state so as to make the adjudication binding upon all the states

resident of the state for the period of one year immediately preceding the bringing of the action, and it was found that the parties were during such time nonresidents of the state).

3. Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917E, 122, 155 Pac. 988; Estate of James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779.

4. Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917E, 122, 155 Pac. 988.

5. Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917E, 122, 155 Pac. 988.

as a judgment in rem. The matrimonial domicile remains with the innocent party.[6] Upon the principles thus established, it seems clear that where a husband leaves his wife in California, where they are domiciled, and goes to another state and there obtains a decree of divorce based upon constructive service only, such decree is not binding upon the courts of California, by virtue of the full faith and credit clause, even if the residence acquired by the husband in the foreign state is bona fide.[7]

§ 156. Bona Fides of Residence or Domicile.—In order that a court of a state where a marriage was not celebrated and where the parties had not lived together as husband and wife may acquire jurisdiction to decree a divorce which the courts of another state will recognize, the

6. In this case the parties had been married and were domiciled in the state of New York in 1868. The husband, without cause, abandoned the wife and the matrimonial domicile and established a bona fide residence in Connecticut. Thereafter, in the courts of Connecticut, he obtained a decree of divorce from his wife upon constructive service only. Many years afterward the wife, who had remained in New York, began an action in that state to obtain a divorce from the husband and obtained personal service upon him in the action. He appeared and set up the Connecticut decree, in defense, as an adjudication that the marriage had been previously dissolved. The supreme court of the United States held that, although the Connecticut decree was good in Connecticut, it was without binding force in the state of New York; that it rested with the state of New York to determine what force and effect should be given to it in that state, and that the supreme court of the United States would not overrule the action of the New York courts in refusing to give credit to the Connecticut decree as a bar to the action of the wife. Notwithstanding the divorce in Connecticut, the courts of New York could proceed to adjudge another divorce and determine therein the property rights of the parties by a decree which could be enforced in New York with respect to parties and property situated therein. It would follow, of course, that if there was personal service in the action in New York, such decree would be binding everywhere, except, perhaps, in the state of Connecticut, where the previous decree had determined locally the rights of the parties. Haddock v. Haddock, 201 U. S. 562, 5 Ann. Cas. 1, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525, see, also, Rose's U. S. Notes.

7. Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917E, 122, 155 Pac. 988, per Shaw, J.

spouse at whose instance the divorce was granted must have acquired a bona fide residence or domicile within the state of the forum. Mere residence, as distinguished from legal domicile, is not sufficient within the rule.[8] And the mere act of going to another state without the intention of remaining there longer than necessary to obtain a divorce does not constitute the establishment of a bona fide residence or domicile.[9]

§ 157. Collateral Attack.—As said in a leading case, it is always competent to impeach collaterally a decree of divorce rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed did not exist; and this is true although the record sought to be impeached may recite the existence of such jurisdictional facts.[10] If such

8. Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779, citing Haddock v. Haddock, 201 U. S. 562, 5 Ann. Cas. 1, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525, see, also, Rose's U. S. Notes. See DOMICILE.

9. Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917E, 122, 155 Pac. 988; Bennett v. Bennett, 28 Cal. 599; Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779.

10. In re James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122, per De Haven, J. ("This case," it was said in In re Culp, 2 Cal. App. 70, 83 Pac. 89, "has been followed in all the well-considered cases in this state involving the same question since the rendition of that opinion, and must be considered the leading case in this state".) See Estate of Pusey, 180 Cal. 368, 181 Pac. 648 (holding in a contest to the probate of a will involving a collateral attack on a foreign judgment of divorce for want of jurisdiction because of the absence of a sufficient affidavit for the publication of the summons, that notwithstanding the recital in such judgment that service of summons by publication had been ordered "upon due and proper affidavits," the evidence supports the finding that but one affidavit was filed, which was insufficient); Estate of Pusey, 177 Cal. 367, 170 Pac. 846 (holding that affidavit for publication of summons was insufficient, but that in view of a recital in the decree that publication was ordered "upon due and proper affidavits" filed and approved by the judge, it must, upon collateral attack, be presumed that there was another affidavit which was sufficient to support the order, and that for some reason the clerk failed to incorporate it in the transcript introduced in evidence); Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917E, 122, 155 Pac. 988; Estate of Hancock, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58 (holding affidavit for publication

lack of jurisdiction is not made to appear, the judgment is as final and conclusive on collateral attack; but if such lack of jurisdiction is made to appear, the judgment must be regarded as a nullity.[11] Where, upon a collateral attack, the evidence is conflicting as to the jurisdictional facts, a finding of the trial court that they exist will not be disturbed on appeal.[12]

A foreign decree of divorce is, however, not subject to attack in a collateral proceeding on account of mere errors or irregularities not going to the jurisdiction.[13] Thus it may not be so attacked because of an imperfect or defective complaint which otherwise sufficiently states the facts to give the court jurisdiction of the subject matter of the action. Nor may such a decree be impeached collaterally for an irregularity in one of the steps taken in obtaining jurisdiction, as the omission of the clerk to sign his name at the foot of the order for publication of summons entered by him in the book kept for the entry of such orders, where the order, as actually published, was full and complete.[14]

§ 158. Vacation for Fraud.—In many states of the Union it is the rule that the power to vacate upon motion a judgment obtained by fraud is inherent in courts of general jurisdiction. A statute limiting the time for relief on the ground of mistake, inadvertence, surprise or

of summons insufficient under Colorado statute, to give court jurisdiction); Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779; Steinbroner v. Steinbroner, 30 Cal. App. 673, 159 Pac. 235.

11. Estate of Hancock, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58. See JUDGMENTS.

12. Estate of Hancock, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58; Estate of James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; Steinbroner v. Steinbroner, 30 Cal. App. 673, 159 Pac. 235 (stating that a finding of a jurisdictional fact by the court of the state wherein the divorce was rendered is prima facie proof and sufficient until overcome to support the jurisdiction).

13. Estate of Hancock, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58; In re James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

14. In re James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

excusable neglect has no application to a motion made upon such ground, but the motion must be made within a reasonable time. What is a reasonable time for such relief is a matter of sound legal discretion in the court in which the motion is made.[15] Thus where a decree is obtained in another state for fraud practiced both upon the court and upon the wife by the husband, it may be vacated there upon motion on notice, made within a reasonable time; and where the court of the state in which the decree was rendered, in setting it aside, held that the wife was not guilty of laches in making her application, that interpretation of the law of such state is conclusive upon the courts of California in subsequent proceedings involving the validity of a second marriage by the husband.[16]

§ 159. Proceedings After Reversal for Failure to Give Full Faith and Credit.—As elsewhere stated, when the supreme court of the United States reverses a judgment of affirmance rendered by the supreme court of California such reversal does not immediately reverse the judgment of the superior court, but, upon the coming down of the remittitur, the appeal is still pending in the supreme court for such further disposition as is not inconsistent with the opinion filed by the federal supreme court.[17] Thus where a judgment affirming a decree of divorce is reversed because of a failure to give full faith and credit to a decree of maintenance obtained by the defendant in another state, and pleaded in bar of the action, the supreme court may nevertheless affirm the judgment, if the findings of the trial court justify the conclusion that the rights under the foreign judgment have been waived. In the absence of such finding, a new trial necessarily follows, and the plaintiff may on such trial urge every defense that he may

15. See JUDGMENTS.

16. Stierlen v. Stierlen, 18 Cal. App. 609, 124 Pac. 226. See CONFLICT OF LAWS, vol. 5, p. 429, as to interpretation of foreign laws generally.

17. See APPEAL AND ERROR, vol. 2, p. 998.

have to the alleged judgment; and if he can show that there was no judgment, or any fact inconsistent with those alleged in the answer in support thereof, or anything which legally avoids the estoppel therefrom, he may do so.[18]

XV. SEPARATION AGREEMENTS.

§ 160. In General.—Under the early English law, contracts contemplating the living separate and apart of husband and wife were regarded as against good morals and contrary to public policy, and therefore illegal.[19] But in more recent times deeds of separation have been upheld by the courts of England.[20] So also in California, while the law generally discourages the separation of husband and wife, it does authorize "A husband and wife . . . [to] agree, in writing, to an immediate separation, and . . . [to] make provision for the support of either of them and of their children during such separation."[1] Notwithstanding the confidential relations which exist between husband and wife it is quite generally held that separation agreements are not against public policy and may be entered into and will be enforced in accordance with their terms when undue advantage has not been taken of either spouse.[2] And in such agreements parents have a right

18. Harding v. Harding, 148 Cal. 397, 83 Pac. 434.

19. 9 Ruling Case Law, 524.

20. Wells v. Stout, 9 Cal. 479.

1. Civ. Code, § 159; Stauter v. Carithers, 185 Cal. 160, 196 Pac. 37; In re Clover's Estate, 179 Cal. 313, 176 Pac. 452; Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488; Harris v. Harris, 136 Cal. 379, 69 Pac. 23; Sheridan v. Sheridan, 134 Cal. 88, 66 Pac. 73; In re Davis, 106 Cal. 453, 39 Pac. 756; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; In re Noah, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287; Joyce v. McAvoy, 31 Cal. 273, 89 Am. Dec. 172; McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460; Murray v. Murray, 28 Cal. App. 533, 153 Pac. 248; Walker v. Walker, 14 Cal. 487, 112 Pac. 479; Estate of Noah, 5 Cof. Prob. Dec. 277.

2. Estate of Yoell, 164 Cal. 540, 129 Pac. 999; Hite v. Mercantile Trust Co., 156 Cal. 765, 106 Pac. 102; Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac.

to contract with each other as to the custody and control of their offspring, and to stipulate away their respective parental rights.[3] However, while the law permits separation under articles of agreement, as it permits divorce, it does not encourage the one more than the other, nor, in fact, either.[4]

The subject of agreements between husband and wife with respect to property is reserved for treatment elsewhere in this work.[5]

§ 161. Legal Requisites—Consideration.—An agreement between a husband and wife to an immediate separation is, of course, subject to the rules which control the contracts of those occupying confidential relations.[6] It is clear that if one of the parties to a separation agreement was in any way coerced or induced by any means against his or her will, he or she will not be bound thereby.[7]

962; Estate of Winslow, 121 Cal. 92, 53 Pac. 362; In re Davis, 106 Cal. 453, 39 Pac. 756; Fealey v. Fealey, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; In re Noah, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287; Wells v. Stout, 9 Cal. 479; Joyce v. Joyce, 5 Cal. 161. See note, 11 A. L. R. 277, as to validity and enforceability of agreement designed to prevent divorce, or avoid or end separation.

3. Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931.

4. Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766.

5. See HUSBAND AND WIFE.

6. Civ. Code, § 158; In re Noah, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287; McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460. See CONTRACTS, vol. 6, p. 72.

7. McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460; Murray v. Murray, 28 Cal. App. 533, 153 Pac. 248 (holding that the fact that the husband would not leave community property of the parties until after a contract of settlement was made did not constitute either coercion, intimidation or undue influence exercised by him); People v. Selby, 26 Cal. App. 796, 148 Pac. 807 (holding that there was no duress or coercion practiced by the husband to bring about a separation by agreement from the fact that he insisted upon a separation because of his wife's confession that she had sustained immoral relations with other men, notwithstanding she subsequently said that her confession was a pure invention; and that therefore separation under such agreement did not constitute an abandonment of his wife within the meaning of Penal Code, § 270a). See note, 5 A. L. R. 823, as to validity of separation agreement as affected by fraud, coercion, unfairness or mistake.

But it has been held that an agreement of separation is not invalid because not understood by the parties at the time of its execution, in the absence of any claim that the signature of either party was obtained by fraud, duress or undue influence.[8] Where the method provided for carrying into effect the principal purposes of a separation agreement was not an integral nor essential part of it, and the method has been executed and accepted by both parties, the entire contract, in itself valid, will not be permitted to fall because of the supposed invalidity attaching to the means adopted.[9] Likewise such an agreement is not invalidated by the fact that it contains invalid provisions having for their object the dissolution of the marriage contract or the facilitating of that result, if they are separable.[10] Thus it has been held that although that portion of a separation agreement, providing for the payment of an attorney fee to the wife, in the event that either of the parties should ever institute a divorce action against the other, is void,[11] it relates to a different subject, and is entirely distinct, disconnected and separable from, and does not invalidate, the valid provisions of the contract.[12] Similarly an agreement of separation is not void because of the recital as a basis for the agreement that the parties had determined among themselves that the relationship of husband and wife could not be longer continued to their mutual satisfaction.[13] It has been held

8. Silva v. Silva, 32 Cal. App. 115, 162 Pac. 142. But see CONTRACTS, vol. 6, p. 90, as to relief against mistake as to legal effect of instrument generally.

9. Estate of Yoell, 164 Cal. 540, 129 Pac. 999.

10. McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460. See Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907, holding an agreement with the object of dissolving the marriage contract or facilitating that result is void as contrary to public policy. And see supra, § 10.

11. McCahan v. McCahan, 47 Cal. App. 173, 190 Pac. 458.

12. McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460, citing Estate of Sloan, 179 Cal. 393, 177 Pac. 150; Mack v. Jastro, 126 Cal. 130, 58 Pac. 372; Beard v. Beard, 65 Cal. 354, 4 Pac. 229.

13. In re Clover's Estate, 179 Cal. 313, 176 Pac. 452, holding that upon the death of the husband the wife, by reason of the validity of such

that an agreement for separation, entered into through the intervention of a trustee, is not invalid as against public policy, and will be upheld and enforced, if followed by immediate separation, or if separation has previously taken place.[14]

"The mutual consent of the parties is a sufficient consideration" for an agreement of separation.[15]

§ 162. Construction.—The rules applicable to the interpretation of contracts generally are applicable to separation agreements.[16] Where, in a separation agreement between a husband and wife, the husband agrees to leave his wife's abode and "depart for" a foreign country, and at no time thereafter to molest her or approach her against her will, the term "depart" does not mean temporary visits, but has reference to a permanent visit, and such contract was broken by his returning to California, and continuing to reside here.[17] But it has been held that where one party does not choose to live separately, as he has the right to do under articles of separation, he cannot complain that the other has not fulfilled a promise, made as a part of the agreement, "not to molest or interfere" with him "in or about the business or living," since the promise was clearly incidental to a separation.[18]

§ 163. Effect—Liens.—Under the express provisions of the Civil Code,

"A husband . . . [is not] liable for her [the wife's] support when she is living separate from him, by agreement, unless such support is stipulated in the agreement."[19]

agreement, is not entitled to letters of administration.

14. Wells v. Stout, 9 Cal. 479.

15. Civ. Code, § 160.

16. See CONTRACTS, vol. 6, § 161 et seq., as to the interpretation of contract generally.

17. Pezzoni v. Pezzoni, 38 Cal. App. 209, 175 Pac. 801.

18. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

19. Civ. Code, § 175. See HUSBAND AND WIFE. See notes, 8

And it has been held that while a husband and wife may, in the absence of grounds for divorce, agree to live apart, a mere verbal contract that they shall so reside does not place upon the husband the duty of supporting the wife while they are so living.[20]

Liens.—An agreement for separation, providing for an annuity to the wife, during her life, to constitute a lien upon the husband's "estate," which is duly acknowledged and recorded, creates a lien upon all of the lands of the husband for arrearages of the annuity, and is notice to a subsequent mortgagee of particular lands belonging to the husband, and entitled to priority over the mortgage. Failure to indicate the locality of the lands, or specifically to describe them, is not fatal to the lien; but the principle that "that is certain which is capable of being made certain," is applicable; and extrinsic evidence is admissible, under proper pleading, to identify the property.[1]

§ 164. Rights as Surviving Spouse.—An agreement of separation does not necessarily affect the rights of one as the surviving spouse in the estate of the other. The parties cannot, by their contract, change their matrimonial status, and if, for example, the husband dies, the wife becomes his widow and may be entitled to the rights of a widow.[2] Yet it is perfectly competent for them to alter their legal relations as to their property, and by proper

A. L. R. 1452, as to unchastity of wife as affecting prior separation agreement; 15 A. L. R. 835, as to liability for necessaries of wife separated from husband; 13 A. L. R. 710, as to right of wife living apart from husband to recover for his death under Workmen's Compensation Act.

20. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546; Volkmar v. Volkmar, 147 Cal. 175, 81 Pac. 413.

1. Higgins v. Higgins, 121 Cal. 487, 66 Am. St. Rep. 57, 53 Pac. 1081.

2. Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766; In re Davis' Estate, 106 Cal. 453, 39 Pac. 756; Eproson v. Wheat, 53 Cal. 715 (holding that an agreement between husband and wife to live separate and apart, the husband to pay a certain sum annually to the wife, does not bar her right to have a homestead set apart to her upon the death of the husband).

agreement either spouse may relinquish his or her interest, both present and prospective, in the property of the other.[3] And where there has been a mutual relinquishment upon the part of the spouses of their property rights and of their rights of succession and inheritance, and where the contract has been fully executed during the lifetime of the parties, the fairness of such contract may not be drawn in question after the death of one by the other, and particularly when questioned by the husband upon the death of the wife.[4] It has been said, however, that the courts should not come to the aid of these contracts so as to deprive either the husband or wife of the property rights growing out of the married relation, except where there is a clear and unmistakable intention to barter away such rights. Accordingly, it has been held that an agreement providing for a division of property and containing a mutual release "from all obligations for the future acts and debts of each other," and an individual release each to the other from the then existing debts and obligations of each, does not amount to a waiver or release by either of the right to succeed to all or any portion of the other's estate.[5] On the other hand, where a wife, in consideration of certain money paid, waives "all her marital claims," she does not thereafter constitute a member of

3. Estate of Yoell, 164 Cal. 540, 129 Pac. 999; Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962; In re Davis' Estate, 106 Cal. 453, 39 Pac. 756 (holding that a surviving wife, who, at the time of the death of her husband, was living apart from him in pursuance of written articles of separation, whereby they agreed to divide their property, relinquish all claims of every nature upon the property of each other then owned or thereafter to be acquired, is not entitled to succeed to any portion of his estate, and consequently neither she nor her nominee is entitled to letters of administration thereon); Estate of Winslow, 121 Cal. 92, 53 Pac. 362; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Estate of Noah, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287.

4. Estate of Yoell, 164 Cal. 540, 129 Pac. 999; Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962; In re Davis' Estate, 106 Cal. 453, 39 Pac. 756; In re Noah's Estate, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287.

5. Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766.

the immediate family of the husband so as to be entitled to an allowance for her maintenance out of his estate under the statute providing therefor.[6]

§ 165. Termination.—Subsequent reconciliation coupled with cohabitation in pursuance thereof operates to avoid an agreement for separation, at least, as to all features remaining executory.[7] The law attaches such consequence

6. In re Noah's Estate, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287; (S. C., 88 Cal. 468, 26 Pac. 361; 5 Cof. Prob. Dec. 277), construing Code Civ. Proc., §§ 1465, 1466. See to the same effect, In re McClelland's Estate, 181 Cal. 227, 183 Pac. 798 (holding that an agreement renouncing all marital rights, and renouncing, quitclaiming and conveying any right or title to the present or future estate of the other spouse, bars the wife's right of inheritance); Estate of Yoell, 164 Cal. 540, 129 Pac. 999 (holding that where the wife, in a separation agreement, relinquished all claims as "heir" of the husband or as his "surviving wife," she was not entitled to a family allowance upon the death of the husband though the agreement did not in terms and by name relinquish the right to such allowance); Estate of Winslow, 121 Cal. 92, 53 Pac. 362 (holding, that a separation agreement providing that it should operate "as a complete settlement and adjustment of all their property rights, relations and affairs," and fully executed by the parties, operated as an abandonment of the homestead upon certain community property); Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358 (distinguishing Eproson v. Wheat, 53 Cal. 715, and holding that where the wife has received an allotted sum under an agreement of separation, which provided that she "relinquish all right as his wife in law or equity or by descent and each party shall have hereafter no claim upon the other for support or sustenance," she had no right thereafter to select a homestead out of the husband's separate property either during his life or after his death).

7. Brown v. Brown, 170 Cal. 1, 147 Pac. 1168 (holding that where a husband and wife, who had executed a written separation agreement which purported to release her rights in the community and to declare after-acquired property the separate property of the person acquiring it, subsequently agreed to become and were reconciled and thenceforth for several months lived and cohabited as husband and wife, and in pursuance of the agreement so to live further orally agreed to and did set aside and annul the separation agreement, such conduct rendered the oral agreement executed, and was a sufficient cancellation of the previous written agreement of separation); Estate of Martin, 166 Cal. 399, 137 Pac. 2; Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766; Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931; Wells v. Stout, 9 Cal. 479.

upon the theory that the consideration for the deed has failed, inasmuch as the maintenance of the wife thereupon becomes obligatory upon the husband.[8] But to avoid a contract of separation, the reconciliation must be permanent and be followed by cohabitation. It must be a reconciliation that restores the former relations of the parties. Mere copulation without occupying the same habitation and dwelling there as husband and wife is by no means sufficient to sustain such a conclusion.[9] It has been said that there is nothing in the language of section 159 of the Civil Code, to indicate an intention that the contract of separation there provided for shall be dependent for its subsistence upon the mere will of either spouse. To the contrary, the section provides in terms that the contract may provide for separate maintenance during separation. Section 101 of the Civil Code, providing for the revocation of consent to a separation, was intended simply to declare the effect of such revocation upon the legal status of the parties as affecting desertion as a ground of divorce, and does not provide for a revocation of the contract of separation provided for in section 159 of the same code; and until avoided by the mutual resumption of marital duties, or the divorce of the parties, such contract remains binding and obligatory as effectually as any other contract, subject only to the limitation imposed by section 101.[10]

Declarations of party refusing reconciliation.—It has been held that a declaration made by a deceased husband, a short time prior to an alleged reconciliation, to the

8. Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931; Wells v. Stout, 9 Cal. 479.

9. Estate of Martin, 166 Cal. 399, 137 Pac. 2 (holding that where after the execution of a separation agreement the husband visits his wife, furnishes her money, writes her endearing letters, has sexual intercourse with her, but does not live with her, the conduct of the parties does not amount to a resumption of marital relations annulling the precedent contract); Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931; Wells v. Stout, 9 Cal. 479.

10. Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931.

effect that he did not want to have anything more to do with his wife is admissible in evidence for the purpose of showing the attitude of the decedent and as going to the probability of such reconciliation and was not self-serving. A different rule, however, is applicable where the declarations of the decedent are made after the alleged agreement of reconciliation and are offered in evidence as proof that no such reconciliation had occurred.[11]

§ 166. Jurisdiction of Courts.—During the lives of the parties a court of equity is the proper forum for the enforcement of any violated rights conferred by a separation agreement.[12] Yet while the validity of a separation agreement releasing the right of inheritance cannot be raised in a probate proceeding to set aside the probate of a will or to determine heirship,[13] in certain cases the probate court has equitable jurisdiction for the purpose of passing upon the validity and effect of such agreements.[14] Thus it has been held that the court in probate, on an application by the surviving wife for a family allowance from her deceased husband's estate, has equitable jurisdiction to pass upon the effect and validity of a separation agreement, which has been interposed as a defense by way of estoppel to her claim.[15]

11. In re Clover's Estate, 179 Cal. 313, 176 Pac. 452, citing Carter v. Younger, 123 Ark. 266, 185 S. W. 435.

12. Estate of Yoell, 164 Cal. 540, 129 Pac. 999; Joyce v. Joyce, 5 Cal. 161.

13. McClelland v. Althouse, 181 Cal. 227, 183 Pac. 798.

14. Estate of Yoell, 164 Cal. 540, 129 Pac. 999; Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962; Estate of Garcelon, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414; In re Noah's Estate, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287.

15. Estate of Yoell, 164 Cal. 540, 129 Pac. 999.

(B. R.)

DOCKETS.

See Courts, vol. 7, p. 751; Judgments; Justices of the Peace.

DOCKS.

See Wharves; Waters.

DOCUMENTARY EVIDENCE.

See Criminal Law, vol. 7, p. 809; Evidence.

DOGS.

See Animals, vol. 2, p. 1.

DOMICILE.

I. Introductory.
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I. Introductory.

1. Scope of Article.
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7. Admissibility.
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I. Introductory.

§ 1. **Scope of Article.**—The question of domicile as herein treated is confined to general principles in respect to the nature of domicile; its mode of acquisition; the capacity of different classes of persons to acquire a domicile; the manner in which it may be lost or changed; and matters of evidence bearing on the determination of its

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Cases are cited in this article to and including 187 Cal., 47 Cal. App. and 207 Pac.

acquisition or loss. The following matters are considered in other articles: domicile as affecting divorce actions;[1] the eligibility and qualifications of public officers,[2] voters,[3] or jurors,[4] as dependent on residence; the right of homestead exemption as an incident of domicile;[5] the residential status of corporations;[6] questions involving property rights, where property and its owner are located in different state or foreign jurisdictions;[7] and the place of trial of actions as affected by the residence of parties.[8]

§ 2. Definition and Distinctions.—The term "domicile" has been defined as the place whence a person goes for labor or other temporary purpose and whither he returns in seasons of repose. It is the place where a person has his home, or his principal home, or where he has his family residence and principal place of business; that residence from which there is no present intention to remove, or to which there is a general intention to return.[9] As indicated by this definition domicile is distinct from mere residence, and includes both residence and an intention to remain.[10] Mere inhabitancy, for a short period, against the intention of acquiring a domicile, does not constitute a domicile.[11] A person may therefore have a residence

1. See DIVORCE AND SEPARATION.
2. See PUBLIC OFFICERS.
3. See ELECTIONS.
4. See JURY.
5. See HOMESTEADS.
6. See CORPORATIONS, vol. 6, p. 692.
7. See CONFLICT OF LAWS, vol. 5, p. 469 et seq.
8. See VENUE.
9. Estate of Sweet, 2 Cof. Prob. Dec. 460.
10. De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345. ("Domicile often depends upon secret intention"); Egener v. Juch, 101 Cal. 105, 35 Pac. 432, 873; Hanson v. Graham, 82 Cal. 631, 23 Pac. 56 (in which the court says: "Where a man has a settled abode for the time being in another state, for purposes of business or pleasure, we think that both reason and authority require him to be treated as a nonresident of this state within the meaning of the attachment law). Younger v. Spreckels, 12 Cal. App. 175, 106 Pac. 905. See infra, § 3. As to meaning of the term "residence" as used in the statutes relating to attachment, see ATTACHMENT, vol. 3, p. 428.
11. Younger v. Spreckels, 12 Cal. App. 175, 106 Pac. 905; People v. Peralta, 4 Cal. 175.

separate from his domicile, and at the same time.[12] But the two residences would never entitle him to more than one domicile at any given time.[13] The term "residence" however, is sometimes used in the sense of domicile, and is so used in some provisions of the constitution and the codes.[14] For example, "residence" is defined in one part of the Political Code as "the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose";[15] and, in that part of the same code relating to the subject of "Elections," it is declared "That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning";[16] and that "the place where a man's family resides must be held to be his residence; but if it be a place for temporary establishment for his family, or for transient objects, it is otherwise."[17] While one of these sections is general and the other is a part of the election law, the courts hold that there is no conflict in them and that they should be construed together as parts of the same statute.[18] The term "residence," as thus used, indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. If a person actually "lives" in a certain place with the intention of remaining there indefinitely that place must be said to be his residence. In other words, the abiding is animo manendi when residence is ac-

12. San Diego Savings Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; Estate of Henning, 128 Cal. 214, 79 Am. St. Rep. 43, 60 Pac. 762; O'Brien v. O'Brien, 16 Cal. App. 103, 116 Pac. 692.

13. Estate of Samuel, Myr. Prob. Rep. 228; Estate of Dunsmuir, 2 Cof. Prob. Dec. 53.

14. See Const., art. II, § 4; art. XX, § 12; Pol. Code, §§ 52, 1239; Civ. Code, § 213; Marston v. Watson, 20 Cal. App. 465, 129 Pac. 611; Younger v. Spreckels, 12 Cal. App. 175, 106 Pac. 905 (where the court in speaking of residence as affecting the question of venue say, that residence depends upon intention as well as fact. See VENUE); Estate of Dunsmuir, 2 Cof. Prob. Dec. 53.

15. Pol. Code, § 52, subd. 1.

16. Pol. Code, § 1239, subd. 1.

17. Pol. Code, § 1239, subd. 7.

18. Estate of Weed, 120 Cal. 634, 53 Pac. 30.

quired.[19] Merely living at a place is not sufficient of itself to establish residence in the latter sense; that is to say, a legal residence or domicile.[20] But the place where a person lives will usually be held to be his domicile until the contrary appears.[1]

II. ACQUISITION AND CHANGE.

§ 3. Residence and Intention.—In order to establish a domicile, the two prime factors are the taking up of a residence in a particular place with the intent to make it a permanent abode, it being declared in the Political Code that a residence or domicile can be changed only by "the union of act and intent."[2] The mere intention to acquire a new residence, without the fact of removal, avails nothing,[3] neither does the fact of removal, without the intention.[4] There must be a union of both, and until such union occurs one retains his former domicile,[5] or, in the

19. Smilie v. Smilie, 24 Cal. App. 420, 141 Pac. 829; Marston v. Watson, 20 Cal. App. 465, 129 Pac. 611.

20. O'Brien v. O'Brien, 16 Cal. App. 103, 116 Pac. 692. See Guardianship of Treadwell, 3 Cof. Prob. Dec. 309, holding the distinction between an "inhabitant" and a "resident" is that the place one inhabits is his dwelling place for the time being, while the place where one resides is his established abode for a considerable time. But see Guardianship of Deisen, 2 Cof. Prob. Dec. 463, where it is said: "'Inhabitant' and 'resident' are synonymous terms in law, and can be strictly applied only to persons who are domiciled in a place with the intent to remain there."

1. See infra, § 8.

2. Pol. Code, § 52, subd. 7; Chambers v. Hathaway, 187 Cal. 104, 200 Pac. 931; Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350; In re Donovan's Estate, 104 Cal. 623, 38 Pac. 456; Dow v. Gould etc. S. M. Co., 31 Cal. 629; People v. Peralta, 4 Cal. 175; Smilie v. Smilie, 24 Cal. App. 420, 141 Pac. 829; Estate of De Noon, 3 Cof. Prob. Dec. 352.

3. Pol. Code, § 1239, subd. 9; Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350; People v. English, 36 Cal. App. Dec. 22, 201 Pac. 145; Smilie v. Smilie, 24 Cal. App. 420, 141 Pac. 829; Estate of De Noon, 3 Cof. Prob. Dec. 352.

4. Pol. Code, § 1239, subd. 9.

5. People v. English, 36 Cal. App. Dec. 22, 201 Pac. 145; Estate of Samuel, Myr. Prob. Rep. 228. But see Budd v. Holden, 28 Cal. 123, holding that one removing his

language of the code, "A residence cannot be lost until another is gained."[6]

One who goes to another state with the intention of remaining there thereby becomes a "bona fide resident" or becomes domiciled there, whatever the reason is which induced him to go, the courts not being concerned ordinarily with the motives influencing one to change his domicile.[7] There should always be some evidence of the abandonment of the former domicile.[8] One does not lose a former domicile by going to and stopping at another place, not to reside there permanently, but only for a limited time.[9] And this is true even though the absence may continue for a number of years.[10] If one takes up a residence in another state for the purpose of procuring a divorce, and with the intention of returning to California after its procurement, he does not establish a bona fide residence there;[11] and a voter who moves into a precinct for temporary purposes only does not gain a residence there, and consequently did not lose his legal residence in the precinct from which he moved, notwithstanding that he may not have had any certain house, room or place therein that he could call his home.[12] On the other hand,

family with intent to reside in another county loses his residence from the time of removal. See 5 A. L. R. 296 and 16 A. L. R. 1298, as to domicile while in itinere from old to new home.

6. Pol. Code, § 52, subd. 3.

7. Estate of Newman, 124 Cal. 688, 45 L. R. A. 780, 57 Pac. 686.

8. Union of act and intent being necessary to make a change of residence, presence in the state for three days would not be sufficient to show change of residence, without satisfactory proof of an abandonment of the domicile in another state. In re Donovan's Estate, 104 Cal. 623, 38 Pac. 456.

9. Preston v. Culbertson, 58 Cal. 198; Dow v. Gould etc. S. M. Co., 31 Cal. 629; People v. English, 36 Cal. App. Dec. 22, 201 Pac. 145.

10. De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045, holding that the living on an American yacht, sailing on high seas from port to port, during an absence continued for years does not deprive one of legal residence in the state, where no intention to abandon such residence appears.

11. Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779. See DIVORCE AND SEPARATION.

12. Huston v. Anderson, 145 Cal. 320, 78 Pac. 626; Smith v. Thomas,

the exercise of the right to enter a soldier's home is as much in accord with one's claim of residence as if he lives elsewhere in the state.[13] If a person has two dwellings in different places and resides a part of his time in one place and a part of the time in the other, the question which of the two places is his legal residence is almost altogether a question of intent.[14] But a floating intention to return to a state by one who had taken a residence for an indefinite period in another state would not be sufficient to retain his domicile in the former.[15]

As affected by character of party.—The rules by which to determine whether one has acquired a domicile in a particular place are the same whether the person is an honest or dishonest person. If there be the requisite residence and intention, one will be deemed to have acquired a domicile, even though he may have absconded from another place.[16] As already suggested, the law is not ordinarily concerned with the motives inducing a person to change his domicile.[17]

§ 4. Boundary Line Through Dwelling. — Where a boundary line passes through a dwelling, the rule is that an occupant's domicile, in the absence of more satisfactory proof, will be deemed to be in that jurisdiction in which the most necessary and indispensable part of the house, such as the sleeping quarters, is situated. Accordingly, it has been held that where the dividing line between two

121 Cal. 533, 54 Pac. 71; People v. English, 36 Cal. App. Dec. 22, 201 Pac. 145. See ELECTIONS.

13. Estate of Gordon, 142 Cal. 125, 75 Pac. 672.

14. Estate of Brady, 177 Cal. 537, 171 Pac. 303; Chambers v. Hathaway, 187 Cal. 104, 200 Pac. 931.

15. Bullis v. Staniford, 178 Cal. 40, 171 Pac. 1064; Estate of Weed, 120 Cal. 634, 53 Pac. 30.

16. Eck v. Hoffman, 55 Cal. 501, holding that absconding debtors from a foreign country who purchase and reside upon a farm in California must be presumed to be domiciled there, notwithstanding they claimed an intention of leaving the United States in the event of selling the farm.

17. See supra, this section.

districts runs through a dwelling-house so that the greater part of the dining-room is in one district and the other rooms are mostly or altogether in the other district, the owner or occupant will be deemed to be domiciled in the latter district. And in the case of boarders, it is held that where the line between two districts divides a ranch so as to leave a bunkhouse and a larger part of the dining-room of the dwelling-house in one district and the remaining and larger portion of the dwelling-house in the other district, unmarried laborers employed on the ranch, who sleep in the bunkhouse and take their meals in such dining-room, are deemed to be domiciled in the former.[18]

§ 5. **Married Women.**—It is both a common law and statutory rule that the residence or domicile of the husband is the residence or domicile of the wife.[19] As the husband is the head of the family, and bound for its support and maintenance, he may change the matrimonial domicile at pleasure, provided he establish a suitable home, a "reasonable place of living,"[20] and it is the duty of the wife to submit to a reasonable exercise of the right.[1] She cannot with just cause change the family domicile,[2] and the fact that a wife actually lives apart from her husband, or may have separated from him by agreement, does not enable the wife to acquire a separate domicile.[3] Thus it has been held that a woman was a resident of the state and entitled to sue her husband domiciled here for

18. Gray v. O'Banion, 23 Cal. App. 468, 138 Pac. 977, 981. See 9 Ruling Case Law, 552. See ELECTIONS, as to application of rule to qualifications of electors.

19. Pol. Code, § 52, subd. 5; Dow v. Gould etc. S. M. Co., 31 Cal. 629; Estate of Austin, Myr. Prob. Rep. 237. See COMMUNITY PROPERTY, vol. 5, p. 280. See 4 Cal. L. Rev. 59, as to what constitutes a matrimonial domicile.

20. Bibb v. Bibb, 39 Cal. App. 406, 179 Pac. 214. See DIVORCE AND SEPARATION.

1. Hardenbergh v. Hardenbergh, 14 Cal. 654. See DIVORCE AND SEPARATION.

2. Mohn v. Sumner, 32 Cal. App. Dec. 666, 191 Pac. 991.

3. Estate of Wickes, 128 Cal. 270, 49 L. R. A. 138, 60 Pac. 867, quoting Dicey on Domicile.

divorce, although she herself had not resided in the state the required length of time;[4] that a wife who was not an actual resident of the state could recover her share of the community property on the decease of her husband domiciled here;[5] and that a deceased wife's will could be probated only in the county of the husband's residence, though they had been living separately and apart in different counties.[6] So also inasmuch as the wife's residence follows her husband's, she can assert no homestead right in premises which her husband has temporarily abandoned,[7] or when the husband resides in another locality,[8] although the intention of the wife to remove with her husband to a new residence will not defeat her right to claim a homestead in the property occupied by them before their residence is in fact changed.[9] A special rule is prescibed by statute in divorce cases. The rule is as follows:

"In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence and not upon legal presumptions."[10]

Under this statutory provision, a wife abandoned by her husband, or forced to separate herself from him because of cruel treatment or failure to support, would be entitled to establish a separate domicile.[11] And where a husband begins a suit for divorce the domicile of the wife ceases to be the domicile of the husband, and she may acquire a separate actual domicile by change of residence from one country to another pending suit.[12]

4. Kashaw v. Kashaw, 3 Cal. 312.

5. Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125.

6. Estate of Wickes, 128 Cal. 270, 49 L. R. A. 138, 60 Pac. 867.

7. Guiod v. Guiod, 14 Cal. 506, 76 Am. Dec. 440. See HOMESTEADS.

8. Bullis v. Staniford, 178 Cal. 40, 171 Pac. 1064.

9. First Nat. Bank v. Bruce, 94 Cal. 77, 29 Pac. 488.

10. Civ. Code, § 129. See DIVORCE AND SEPARATION.

11. Moffatt v. Moffatt, 5 Cal. 280; In re Wickes' Estate, 128 Cal. 270, 49 L. R. A. 138, 60 Pac. 867.

12. McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103.

§ 6. Infants.—Both by the common law and by the code "The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child."[13] This general rule does not apply, however, when the child is under the age of fourteen years and has been abandoned by the father, for in such case he forfeits the guardianship of the child and can no longer claim its custody, and its residence is the place to which it is removed by those who intend to give it a permanent home.[14] Where a husband and wife are living in a state of separation, the county of the husband's residence is the county of the residence of the minor children, unless he has consented to their acquiring residence elsewhere, or has voluntarily relinquished his parental authority over them, or has otherwise been legally deprived thereof.[15] If the parents of a minor be dead, his domicile is that of the deceased parents until it is changed by competent authority,[16] the minor himself being non sui juris, and powerless to change his domicile.[17] But after the adoption his domicile becomes that of those who adopt him, irrespective of the place of his birth or of the residence of his deceased parents.[18] In the case of an illegitimate child its domicile follows that of the mother, but it would seem that, in case of legitimation, the domicile of such child would follow that of the father, even

13. Pol. Code, § 52, subd. 4. See 5 A. L. R. 958, as to approximation to maturity as affecting the rule that an infant cannot change his domicile.

14. In re Hawkins, 183 Cal. 568, 192 Pac. 30; In re Vance, 92 Cal. 195, 28 Pac. 229. See 5 A. L. R. 949, as to emancipation by parent as affecting right of infant to change domicile.

15. Luck v. Luck, 92 Cal. 653, 28 Pac. 787; Cole v. Superior Court, 28 Cal. App. 1, 151 Pac. 169.

16. Estate of Henning, 128 Cal. 214, 79 Am. St. Rep. 43, 60 Pac. 762. See CONFLICT OF LAWS, vol. 5, p. 439.

17. Pol. Code, § 52, subd. 6; In re Hawkins, 183 Cal. 568, 192 Pac. 30; Estate of Henning, 128 Cal. 214, 79 Am. St. Rep. 43, 60 Pac. 762.

18. Estate of Taylor, 131 Cal. 180, 63 Pac. 345.

though it had been born in a foreign country and remained there after its legitimation.[19]

III. EVIDENCE.

§ 7. Admissibility.—In proof of the intent necessary to the acquisition of domicile, evidence of the acts or declarations of the party are competent.[20] This rule is equally applicable to testamentary declarations of a decedent.[1] A registration affidavit as a voter in a certain place is admissible in evidence as a declaration tending to show that such place constituted affiant's legal residence at the time.[2] So also the fact that a person exercised the elective franchise in a certain place is some evidence of domicile,[3] though it may not be conclusive.[4] But the lack of residence cannot be shown by failure to register, as it is optional with an elector whether or not to exercise his right of registration and elective franchise.[5] The residence of a person at a certain time and place is not a fact of any general or public interest, and cannot be proved by evidence of the general understanding and report of the community.[6]

§ 8. Presumptions and Burden of Proof.—The burden of proof is on one asserting a change of domicile to prove the acquisition of a domicile in another place.[7] Actual residence in a place raises a presumption of domicile there.[8] But it has been held that a family residence is not pre-

19. Blythe v. Ayres, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915. See CONFLICT OF LAWS, vol. 5, p. 436.

20. Estate of Brady, 177 Cal. 537, 171 Pac. 303.

1. Estate of De Noon, 3 Cof. Prob. Dec. 352.

2. Chambers v. Hathaway, 187 Cal. 104, 200 Pac. 931.

3. Estate of Austin, Myr. Prob. Rep. 237.

4. See infra, § 9.

5. Estate of Gordon, 142 Cal. 125, 75 Pac. 672.

6. Pfister v. Dascey, 68 Cal. 572, 10 Pac. 117.

7. Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350.

8. Dow v. Gould etc. S. M. Co., 31 Cal. 629.

sumptively that of the husband where he pays only occasional visits to the family.[9] The fact that one's original residence was in a certain locality would raise no presumption of its continuance as against positive evidence that he deliberately changed it.[10] And the removal of minors to another state will raise no presumption of a change of domicile, in the absence of evidence to show that it is otherwise than temporary, in view of the fact that their residence can be changed only by competent authority.[11]

§ 9. **Weight and Sufficiency.**—The question whether or not a person is a bona fide resident of or is domiciled in the state is a mixed question of law and fact.[12] In determining this question and in determining the existence of the requisite intent, the acts and declarations of the party must be taken into consideration,[13] although his acts and conduct are ordinarily more conclusive than are his declarations.[14] The declarations of intention with which an act is done may illustrate the character of the act as a part of the res gestae. But declarations are entitled to little, if any, consideration, when made either as a narration of a past act, or as indicating the purpose with which an act is to be done in the future.[15] It has been held, however, that the statement by a testator in his will that he is a resident of a certain place may, under some circumstances, be conclusive on that question.[16] The direct testimony of a party as to where he has his legal residence

9. Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350.

10. Estate of Brady, 177 Cal. 537, 171 Pac. 303.

11. Estate of Henning, 128 Cal. 214, 79 Am St. Rep. 43, 60 Pac. 762.

12. Estate of Weed, 120 Cal. 634, 53 Pac. 30; In re Donovan's Estate, 104 Cal. 623, 38 Pac. 456; Quinn v. Nevills, 7 Cal. App. 231, 93 Pac. 1055. See TRIAL.

13. Estate of Damke, 133 Cal. 433, 65 Pac. 888, where the court say that "While it may be said that the residence of a person is to be determined by his intentions, still it may also be said that his intentions are to be determined by his acts."

14. Estate of Sweet, 2 Cof. Prob. Dec. 460.

15. Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350. See supra, § 3.

16. Estate of De Noon, 3 Cof. Prob. Dec. 352.

is of more weight than that of witnesses who testify to its existence elsewhere.[17] And the positive testimony of a married woman as to her residence in California is not overcome by proof that her husband held a position as postmaster in another state, where it appears that he was manager of a ranch situated in both states, that the post-office had been established for the accommodation of ranch employees, and that the husband's duties required him to spend as much time in one state as the other.[18] While the exercise of the elective franchise in a place is some evidence of domicile, it is not conclusive proof.[19] Yet it has been held that an intention to change one's place of residence is sufficiently shown, in the absence of substantial evidence to the contrary, by the changing of registration for voting purposes, followed by contemporaneous and subsequent declarations that it was the purpose of the declarant to become a resident of another county.[20] Entries in directories and telephone-books not shown to have emanated from the person whose domicile is in question are entitled to no weight as evidence.[1]

Where the question of residence of a party has been determined by the trial court on conflicting evidence, the findings of the court will not be disturbed on appeal.[2]

17. McKune v. McKune, 32 Cal. App. Dec. 572, 191 Pac. 958; O'Brien v. O'Brien, 16 Cal. App. 103, 116 Pac. 692.

18. Dean v. Dunn, 9 Cal. App. 352, 99 Pac. 380.

19. Bradley v. Davis, 156 Cal. 267, 104 Pac. 302; Quinn v. Nevills, 7 Cal. App. 231, 93 Pac. 1055. See supra, § 7.

20. Estate of Brady, 177 Cal. 537, 171 Pac. 303.

1. Estate of Brady, 177 Cal. 537, 171 Pac. 303.

2. Bradley v. Davis, 156 Cal. 267, 104 Pac. 302; Huston v. Anderson, 145 Cal. 320, 78 Pac. 626; Smith v. Thomas, 121 Cal. 533, 54 Pac. 71; Estate of Weed, 120 Cal. 634, 53 Pac. 30; Quinn v. Nevills, 7 Cal. App. 231, 92 Pac. 1055. See APPEAL AND ERROR, vol. 2, p. 921.

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See COMMUNITY PROPERTY; HUSBAND AND WIFE.

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I. INTRODUCTORY.

§ 1. Definitions.—The words "drain" and "ditch" have no technical or exact meaning, but are used to signify a hollow space in the ground, either natural or artificial, where water is collected and conveyed away.[1] To drain land is to rid it of its superfluous moisture. This is generally done by deepening, straightening or embanking the natural watercourses which run through it, and by supplementing them when necessary by artificial ditches and canals.[2] "The swamp and overflowed lands of this state require different methods of reclamation. In some instances the land may be entirely reclaimed by a series of drainage ditches through and over the land reclaimed, draining by gravity the surplus waters into some river or other outlet. In other instances, the entire body of land is inclosed by embankments to exclude the overflow of creeks and rivers, and the seepage water and rainfall are removed by pumping apparatus. In other cases, both drainage by ditches and by pumping is resorted to."[3] The term "drainage of land" has practically the same application as "reclamation," the one being the means employed, the other the result.[4] "Reclamation" is properly defined as a "practical protection from probable dangers."[5] "Reclamation, levee, swamp-land and drainage districts have a similarity of purpose which is most obvious—each has for one of its principal objects the keeping of surplus water from some definite area."[6]

§ 2. Scope of Article.—There is a distinction between drainage acts, the purpose of which is to get rid of water

1. 9 Ruling Case Law, 618.
2. People v. Parks, 58 Cal. 624 (opinion of McKee, J.).
3. Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668.
4. Laguna etc. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933.
5. Inglin v. Snider, 163 Cal. 747, 127 Pac. 60.
6. Sacramento etc. Drainage Dist. v. Rector, 172 Cal. 385, 156 Pac. 506.

as an injurious element, and other legislation which treats it as a beneficial agent.[7] The present article regards water, in its relation to land, as an injurious element, and deals with the methods and organization for its removal. It therefore excludes the use of water as a beneficent agent, as in irrigation,[8] or in mining projects,[9] and the use of streams for navigation, or the development of power.[10] So also it excludes the rights and liabilities incident to the natural drainage of surface waters.[11] The article concerns the removal of water, not waste matter or sewage, a subject which is treated elsewhere.[12] And it concerns the removal of water, rather than the protection of lands from waters, particularly flood waters, which are not yet upon them. This latter object, and the instrumentalities designed to promote it, such as storm drains, levee, flood control, and protection districts, and the immense project known as the Sacramento and San Joaquin Drainage District, are considered in another place.[13] The scope of the present article is, therefore, substantially commensurate with the provisions of the Political Code in regard to reclamation districts,[14] and certain statutes, not codified relating to drainage.[15]

§ 3. **Authority of the State in General.**—Drainage is a public purpose,[16] the control over which is vested in the legislature of the state.[17] The drainage and reclamation of lands involve a legitimate exercise of the police power, as they not only promote the public good by adding to the productive area of the state, but they also promote the public health.[18] Ponds, marshes and low, swampy places are

7. Van de Water v. Pridham, 33 Cal. App. 252, 164 Pac. 1136.
8. See WATERS.
9. See MINES AND MINERALS.
10. See WATERS.
11. See WATERS.
12. See MUNICIPAL CORPORATIONS.
13. See WATERS.
14. Pol. Code, §§ 3446–3493½.
15. See Deering's General Laws, Acts 977–987, and Consolidated Supplement, 1917–1921, Acts 985–987.
16. People v. Parks, 58 Cal. 624 (opinion of McKee, J.); Rico v. Snider, 134 Fed. 953.
17. Rico v. Snider, 134 Fed. 953.
18. Gray v. Reclamation Dist.

generally recognized as a menace to the public health of the neighborhood in which they exist as generating malaria, and it is to the public interest that they be abated and removed.[19] The authority to form reclamation districts is sometimes ascribed to the taxing power of the state.[20] The state may adopt any policy consistent with reason for the prosecution of the work of reclaiming its swamp and overflowed lands, and may change its policy at will. The matter is one exclusively for legislative determination, and there is no constitutional limitation upon the legislature's power to change its policy.[1] And in varying its plans, the legislature may create new agencies or mandatories. If vested rights are impaired, redress may be had from the courts.[2]

§ 4. Under the Federal Grant.—To enable the several states to construct the necessary levees and drains and to reclaim the swamp and overflowed lands thereon, a grant to the states of all the public land therein which was swamp and overflowed was made by the act of congress of September 28, 1850, known as the Arkansas Act.[3] In

No. 1500, 174 Cal. 622, 163 Pac. 1024; Laguna etc. Dist. v. Chas. Martin Co., 144 Cal. 209, 77 Pac. 933; In re Madera Irr. Dist., 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675, quoted in Billings Sugar Co. v. Fish, 40 Mont. 256, 20 Ann. Cas. 264, 26 L. R. A. (N. S.) 973, 106 Pac. 565. See CONSTITUTIONAL LAW, vol. 5, p. 699.

19. The state has power to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; Laguna etc. Dist. v. Chas. Martin Co., 144 Cal. 209, 77 Pac. 933.

20. Williams v. Sacramento County, 65 Cal. 160, 3 Pac. 667.

1. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

2. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207. See infra, §§ 66–72, as to reorganization, division, consolidation and dissolution of reclamation districts.

3. 9 U. S. Stats. at Large, p. 519; 8 Fed. Stats. Ann. 708.

accepting the grant, the state of California became bound to carry out in good faith the objects for which it was made, and this obligation has been fully recognized by subsequent state legislation.[4] The grant has been declared to be, by its nature and obligation, a trust, to bring about reclamation, although the title passed to the state.[5] Although the act provides that the proceeds of such lands, whether from sale or by direct appropriation in kind, shall be applied to the reclaiming of the lands, no formal trust was created in so far as the proceeds of the sale of the land was concerned, the disposition of such proceeds remaining solely in the discretion and good faith of the state.[6] In the disposition of the lands by the state to purchasers, reclamation was contemplated.[7] And those who bought them took them subject to the same obligation under which the state lay to the federal government.[8] This is so, even though the statute under which the purchaser bought, passed subsequently to legislation establishing a reclamation system, made no mention of reclamation but authorized the issuance of a patent on payment of the purchase price. Nor would the fact that the latter statute repealed all inconsistent enactments, affect the case, since it was not inconsistent with the system of reclamation already established. But the subordination of the purchaser's title to the power of the state to reclaim the land goes even further. The state may, after the purchaser has

4. County of Kings v. County of Tulare, 119 Cal. 509, 51 Pac. 866; Reclamation District v. Hagar, 66 Cal. 54, 4 Pac. 945; Kimball v. Reclamation Fund Commrs., 45 Cal. 344; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. See Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625, saying it is the right and duty of the state, acting for the public benefit and general welfare, to reclaim these lands.

5. Miller & Lux v. Batz, 142 Cal. 447, 76 Pac. 42.

6. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes.

7. Miller & Lux v. Batz, 142 Cal. 447, 76 Pac. 42. See infra, § 9 et seq.

8. Kimball v. Reclamation Fund Commrs., 45 Cal. 344; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

obtained a patent, so modify the system of reclamation established by previous legislation as to provide that the expense of reclamation, previously borne by the swamp-land fund in the state treasury, should thereafter be raised by assessment on the land, and the purchaser must be deemed to have accepted his title subject to the right of the state to impose this added burden on the land.[9] The imposition of this burden by the state on its grantees is not an impairment of the obligation of contracts, forbidden by the federal constitution,[10] nor does it violate the terms of the grant, as the latter, as we have seen, did not create a formal trust.[11]

§ 5. As Dependent upon Sources of Title.—So complete is the control of the state over swamp and overflowed lands, that it may provide for reclamation not only of those lands acquired under the Arkansas Act, but of all swamp and overflowed lands in the state, whether the title was derived from a Spanish or Mexican grant,[12] or any United States patent.[13] It is the character of the land and its susceptibility to reclamation under one system of works, and not the source of the owner's title, which authorizes the action of the state.[14-15]

9. Kimball v. Reclamation Fund Commrs., 45 Cal. 344.

10. Reclamation District v. Hagar, 66 Cal. 54, 4 Pac. 945.

11. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes. See supra, this section. See infra, §§ 71, 72, as to return of purchase price to the purchaser after reclamation.

12. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes; Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366, 6 Sawy. 567. See People v. Hagar, 52 Cal. 171, and Hagar v. Supervisors of Yolo County, 47 Cal. 222, holding the act of March 28, 1868 (Stats. 1867–68, p. 507), related to the reclamation of all swamp and overflowed land in the state, even if the title was derived from a Mexican grant. Sections 3440 to 3489 of the Political Code are based upon this act. See infra, § 9 et seq.

13. Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366, 6 Sawy. 567.

14–15. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes.

§ 6. Power to Create and Control Local Districts.—The legislature may provide for the reclamation of swamp and overflowed lands directly without giving the land owners any voice in the selection of managers or trustees,[16] or it may accomplish the same work through the instrumentality of bodies, such as reclamation districts.[17] The creation of such districts[18] and the delimiting of their boundaries[19] rest wholly in the discretion of the legislature, and no other branch of the government has any voice in the matter, except to declare whether or not it may have been acted within constitutional limitations. Such districts are neither private corporations nor corporations for municipal purposes within the constitutional provision inhibiting the creation of such corporations by special act.[20] Indeed, if they are corporations they are in a class by themselves, and the general powers of the legislature for their creation, organization and control are in no wise limited by the state constitution.[1] The legislature may, for example, confer on a board of supervisors the power to include in a reclamation district organized by it, lands in another county.[2] So also it may not only create, but it may divide, change or abolish reclamation districts at pleasure.[3] It may create a district even against the will of its inhabitants.[4]

16. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207.

17. Lamb v. Reclamation Dist. No. 108, 73 Pac. 125, 2 Am. St. Rep. 775, 14 Pac. 625.

18. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582.

19. Laguna etc. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933.

20. See infra, §§ 9, 16.

1. People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676.

2. Reclamation District v. Hagar, 66 Cal. 54, 4 Pac. 945; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes.

3. Reclamation Dist. No. 70 v. Birks, 159 Cal. 233, 113 Pac. 170. See infra, § 66.

4. Laguna etc. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933. See infra, § 9.

Delegation of powers.—Since the creation of reclamation districts is a matter belonging exclusively to the legislature, it follows that the legislature cannot delegate these powers to any other department of the government or to any agency of its appointment, particularly to executive officers of the state.[5]

§ 7. Power to Authorize Assessments.—The legislature has power, in a proper case, to impose a burden in the nature of a tax upon specific lands, in proportion to the estimated special benefits which those lands will receive from work done, if the character of the work is such that its performance confers some general benefit on the public as well as a private benefit on the land owner. The drainage and reclamation of swamp and overflowed lands is work of that character.[6] This power is founded not only upon the power to do all things necessary to conserve the health and general welfare of the public, but the statutes enacted pursuant thereto are upheld as reasonable regulations for the benefit of those who are deemed owners of a common property.[7] Such statutes are not unconstitutional either as violating the security of property rights, or as taking private property for public use without compensation.[8] And an assessment in proportion to benefits is not double taxation merely because a part of the general taxes the land owner is compelled to pay the state may be devoted to the same work.[9] All that is required in such cases is that the charge shall be apportioned in

5. People v. Parks, 58 Cal. 624 (holding the act of April 23, 1880, unconstitutional); Doane v. Weil, 58 Cal. 334. See CONSTITUTIONAL LAW, vol. 5, pp. 656–677.

6. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207.

7. Van de Water v. Pridham, 33 Cal. App. 252, 164 Pac. 1136. See supra, § 3.

8. Hagar v. Supervisors of Yolo County, 47 Cal. 222. Cited in Billings Sugar Co. v. Fish, 40 Mont. 256, 20 Ann. Cas. 264, 26 L. R. A. (N. S.) 973, 106 Pac. 565.

9. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207.

some just and reasonable mode, according to the benefits received.[10] Indeed, reclamation assessments are allowed at all only because the property assessed is presumed to be benefited at least to the amount of the charge made upon it. And only the property so benefited can be held for the assessment. A statute which would authorize a general judgment for such an assessment would be unconstitutional.[11]

§ 8. Legislative History.—The Arkansas Act[12] by which the grant of swamp and overflowed lands was made by the federal government to the state was approved September 28, 1850. Its purpose was to enable the state to reclaim the lands by means of levees and drains.[13] In 1861, the legislature passed an act creating a state board for the reclamation of swamp and overflowed lands, and for the organization of reclamation districts on petition of the owners.[14] An entirely new policy with regard to reclamation was inaugurated by the act of March 28, 1868, known as the Green Act.[15] This act was intended to establish a complete system for the reclamation of all swamp and overflowed lands in the state.[16] It repealed all previous acts, and became practically the basis of the subsequent land system of the state.[17] A third phase in reclamation

10. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes. See infra, § 35.

11. Atchison etc. Ry. Co. v. Reclamation Dist. No. 404, 173 Cal. 91, 159 Pac. 430. See People v. Houston, 54 Cal. 536, holding that an act requiring the trustees of a reclamation district to make a sworn statement of the total cost and incidental expenses of the work of reclamation "based upon the books and vouchers" of the district, and to report it to the board of county supervisors to be assessed on the lands of the district, is unconstitutional. See Miller v. Sacramento etc. Dist., 182 Cal. 252, certiorari denied, 256 U. S. 129.

12. See supra, § 4.

13. County of Kings v. County of Tulare, 119 Cal. 509, 51 Pac. 866.

14. Stats. 1861, p. 355; People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016.

15. Stats. 1867–68, p. 507.

16. People v. Parvin, 74 Cal. 549, 16 Pac. 490; Hagar v. Supervisors of Yolo County, 47 Cal. 222.

17. County of Kings v. County of Tulare, 119 Cal. 509, 51 Pac. 866.

legislation was marked by the adoption of the Political Code in 1872. This also furnished a reclamation system, complete in itself,[18] and differing widely in various particulars from the previous legislation. Its provisions related only to districts formed under it;[19] and all districts formed under the Green Act continued to exist and function by virtue of its provisions without dependence on the Code,[20] though they were allowed to reorganize under its provisions.[1] By virtue of an amendment in 1911, however, all legally existing reclamation districts, formed under any statute of the state, are made subject to the provisions of the Political Code.[2] Besides the general system prescribed by the Political Code, and in addition to much special legislation,[3] three statutory systems of general import are to be found in the uncodified statutes of the state. The first of these, embodied in the act of March 3, 1881,[4] and held unconstitutional as permitting private property to be taken for private use,[5] was virtually reestablished by the act of March 18, 1885.[6] This system

18. Pol. Code, §§ 3446–3493½.

19. People v. Parvin, 74 Cal. 549, 16 Pac. 490.

20. Swamp Land Dist. No. 121 v. Haggin, 64 Cal. 204, 30 Pac. 631; Reclamation Dist. No. 3 v. Goldman, 61 Cal. 205.

1. Pol. Code, § 3478, as originally enacted.

2. Pol. Code, § 3478.

3. See, for example, Stats. 1913, p. 109; amended Stats. 1915, p. 546; Stats. 1917, p. 277; Stats. 1919, p. 365, creating Knight's Landing Ridge drainage district; Stats. 1909, p. 1024, creating Yolo Basin drainage district; Stats. 1917, pp. 3 and 4, validating drainage improvement districts one and two in Merced county; Stats. 1919, p. 135, validating Los Angeles county drainage improvement district number three; Stats. 1917, p. 789, relating to drainage district number one, Butte county; Stats. 1917, p. 227, validating Los Angeles county drainage district improvement number one; Stats. 1919, p. 32, validating proceedings in drainage district number one hundred, Butte county; Stats. 1919, p. 713, validating bonds of Bellevue Wilfred drainage district; Stats. 1921, p. 30, validating proceedings in drainage district number two hundred, Butte county, etc.

4. Stats. 1881, p. 15.

5. Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459.

6. Stats. 1885, p. 204; Act 985, Deering's General Laws; Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459, holding the act of 1885 does not repeal the act of 1881.

has been said to be modeled on the Green Act, and to be practically identical with it, except that it is not limited in its application to any particular character of lands.[7] The second statutory system, embodied in the act of March 21, 1903,[8] was superseded and repealed by a similar act—that of May 18, 1919, now in force.[9] Under this system the work is done for the district under a contract let by the county board of supervisors. The third statutory system is contained in the act of March 30, 1903.[10] Under it a drainage district is organized at an election of voters within its boundaries, called by the supervisors, and is given more nearly the character of a true municipal corporation, with wide powers of self-government.[11] In addition to what is here said, it may be noted by the act of March 24, 1893,[12] for the sale of lands uncovered by the drainage of inland lakes, etc., the provisions of the Political Code with reference to reclamation were made applicable to such lands.[13] Also that by the act of March 18, 1907,[14] irrigation districts were given authority to provide for any and all drainage made necessary by irrigation of their lands.

It is impossible, within the limits of this article, to give even a summary of this elaborate and involved legislation, except in so far as it has been passed on by the courts. The reader must be referred to the statutes themselves for the details of these provisions.

7. Laguna etc. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933.

8. Stats. 1903, p. 354. See Van de Water v. Pridham, 33 Cal. App. 252, 164 Pac. 1136, holding that the act was not repealed as to Los Angeles county by the Los Angeles County Flood Control Act, Stats. 1915, p. 1502.

9. Stats. 1919, p. 731, amended Stats. 1921, p. 894; Act 986a, Deerings Supplement, 1917–1921.

10. Stats. 1903, p. 291, amended Stats. 1909, p. 1061; Stats. 1915, p. 1321; Stats. 1921, p. 38. See Act 987, Deering's General Laws, and Supplement, 1917–1921.

11. See infra, § 9, as to corporate character of reclamation districts.

12. Stats. 1893, p. 341.

13. McCord v. Slavin, 143 Cal. 325, 76 Pac. 1104.

14. Stats. 1907, p. 569.

§ 9. Reclamation Districts as Legal Entities.—Considerable confusion exists as to the precise nature of reclamation districts as legal entities, and the exact status to be accorded them as corporate bodies. They are not private corporations.[15] In some of the earlier cases they are regarded as municipal corporations.[16] But it is now well settled that they are not municipal corporations, at least in the ordinary acceptance of the term.[17] The distinction has been clearly stated by the supreme court.[18] At the present time, the tendency is to define reclamation districts either as public or quasi corporations,[19] or as mere state agencies not, in strictness, possessing a corporate character at all.[20] And the essen-

15. Gallup v. Sacramento etc. Drainage Dist., 171 Cal. 71, 151 Pac. 1142; People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676; Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

16. Swamp Land District v. Silver, 98 Cal. 51, 32 Pac. 866; Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; Reclamation District v Hagar, 66 Cal. 54, 4 Pac. 945. See MUNICIPAL CORPORATIONS.

17. Gallup v. Sacramento etc. Drainage Dist., 171 Cal. 71, 151 Pac. 1142; Swamp Land Reclamation Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389; People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676; People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016; Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505 (while they exercise public functions and act as state agencies, they have no general powers of government); Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277; Sels v. Greene, 88 Fed. 129.

18. People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016.

19. Swamp Land etc. Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389; San Francisco Sav. Union v. Reclamation Dist. No. 124, 144 Cal. 639, 79 Pac. 374; Angus v. Browning, 130 Cal. 503, 62 Pac. 827; Reclamation Dist. No. 542 v. Turner, 104 Cal. 334, 37 Pac. 1038; Swamp Land District v. Silver, 98 Cal. 51, 32 Pac. 866; Reclamation District v. Gray, 95 Cal. 601, 30 Pac. 779; People v. Le Rue, 67 Cal. 526, 8 Pac. 84; Hoke v. Perdue, 62 Cal. 545; People v. Williams, 56 Cal. 647; People v. Reclamation Dist. No. 108, 53 Cal. 346; Dean v. Davis, 51 Cal. 406; Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505; Sels v. Greene, 81 Fed. 555.

20. Reclamation District v. Superior Court, 171 Cal. 672, 154 Pac. 845; Hershey v. Reclamation District, 162 Cal. 401, 122 Pac. 1074; Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170; People

tial confusion is emphasized by certain cases in which they are given both characters.[1] Regarded as public corporations, they are also denominated quasi corporations for the reason that they have not all the powers which belong to corporations by the common law, or all those which are usually possessed by municipal corporations. But as they possess all the powers, either by express grant or necessary implication, which are necessary for the performance of the duties enjoined upon them by law, they are to be regarded as public corporations for municipal purposes.[2] Their political character and status is similar to that of school districts.[3] What has been said applies more especially to reclamation districts organized under the Political Code, or statutes resembling it. A swamp-land district marked out under the act of 1861 was a mere assessment district.[4] It has been held, however, that a drainage district established under the act of 1885[5] was a public corporation,[6] and the act of March 20, 1903[7] would seem to contemplate a district having much the character of a true municipal corporation.

v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207; Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668; Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401 (saying that there is no provision for perpetual succession, and there are only two or three usual powers of a corporation granted them. They are, in their essential character, mere agencies); Argyle Dredging Co. v. Chambers, 40 Cal. App. 332, 181 Pac. 84; Spurrier v. Meumiller, 37 Cal. App. 683, 174 Pac. 338; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277; Sels v. Greene, 88 Fed. 129.

1. Atchison etc. Ry. Co. v. Reclamation Dist. No. 404, 173 Pac. 91, 159 Pac. 430; Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401; People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016.

2. People v. Reclamation Dist. No. 108, 53 Cal. 346.

3. Reclamation Dist. No. 70 v. Birks, 159 Cal. 233, 113 Pac. 170.

4. People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016.

5. Stats. 1885, p. 204.

6. Laguna Drainage Dist. v. Chas. Martin Co., 144 Cal. 209, 77 Pac. 933.

7. Stats. 1903, p. 291, amended Stats. 1909, p. 1061; Stats. 1915, p. 1321; Stats. 1921, p. 38. See Act 987, Deering's General Laws.

II. ORGANIZATION OF RECLAMATION DISTRICTS.

§ 10. In General.—Reclamation districts, not created by special legislation, are formed by order of the board of supervisors of the county in which the lands, or the bulk of them, are situated.[8] The board acquires jurisdiction by the filing of a petition signed by property owners within the proposed district,[9] and by its publication.[10] It then becomes the duty of the board to consider the petition to determine whether the facts therein stated are true, and, if it finds affirmatively, to approve the petition and establish the district.[11]

§ 11. Petition in General—Nature and Necessity.—In order to give a board of supervisors jurisdiction of proceedings for the formation of a reclamation district, it is necessary that a petition by the requisite number of owners, stating the facts required by statute, be presented to it.[12] Such a petition is jurisdictional, and the absence thereof may be taken advantage of at any time, even for the first time on appeal.[13] Yet a substantial compliance

8. Pol. Code, §§ 3446, 3449; Act 985, §§ 1, 3; Deering's General Laws; Act 896a, §§ 2, 3; Consolidated Supplement, 1917–1921, Deering's General Laws; Act 987, §§ 2, 6, Deering's General Laws (under which, however, the board merely orders an election for the creation of the district). As to creation by special legislation, see infra, § 18.

9. See infra, §§ 11–13,

10. See infra, § 14.

11. Pol. Code, § 3449; People v. Hagar, 52 Cal. 171. See infra, § 15.

12. Pol. Code, §§ 3446, 3447, as amended by Stats. 1917, p. 1191; Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225; People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27; Ralston v. Board of Supervisors of Sacramento County, 51 Cal. 592; People v. Hagar, 52 Cal. 171; Ferran v. Board of Supervisors, 51 Cal. 307.

13. People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27 (holding petition fatally defective for failure to properly describe lands, a requirement abrogated by the amendment of 1917—Stats. 1917, p. 1191—to Political Code, § 3446); Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156.

with the statutory requirements is all that is required.[14] And when reviewed after the formation of a district and the expenditure of large sums, at suit of one who, though present at the hearing before the board, did not then object to it, the petition should be given the most favorable interpretation of which it is susceptible, and every reasonable intendment indulged in its support.[15]

The petition for the formation of a reclamation district is a public writing, and a judicial record within the meaning of sections 1888 and 1904 of the Code of Civil Procedure, providing how such writings and records may be proved.[16]

§ 12. Description of Lands and Their Ownership.—Since the amendment of 1917 to section 3446 of the Political Code, a petition for the creation of a reclamation district must set forth that the petitioners propose to form a reclamation district and also a description of the exterior boundaries of the proposed district, the total number of acres situate therein, the names of the owners of record of real property within said boundaries, the county or counties within which the district lies, and if in more than one county the number of acres in each.[17] Prior to the amendment, the petition was required to set out a description of the lands within the proposed district "by legal subdivisions or other boundaries," and the names of the legal owners, if known, and it was held that it was not enough to give the total number of acres, or to say that the land was in a particular survey.[18] It was suffi-

14. Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505.

15. Hagar v. Supervisors of Yolo County, 47 Cal. 222.

16. People v. Hagar, 52 Cal. 171. See JUDGMENT; RECORDS.

17. Stats. 1917, p. 1191. See Deering's Consolidated Supp. to Codes & Gen. Laws 1917–1921, p. 546.

18. People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27 (holding that a description, "that all of swamp land survey Nos. 329 and 330," etc., conferred no jurisdiction on the board); Ferran v. Board of Supervisors, 51 Cal. 307 (petition for the formation of a new district from a portion of an

cient, however, to describe a tract with the certainty requisite in a conveyance. A failure to state the acreage is immaterial if the petition refers to a map as an exhibit, and the acreage might be ascertained therefrom by computation.[19] Where an owner is designated by a title indicative of corporate existence, it will be presumed that it is a corporation and is capable of taking and holding title to land, though there are no averments to this effect in the petition.[20] Under a statute[1] requiring that a petition should state the quantity of land sold and the quantity remaining unsold in the proposed district, it was technically insufficient to merely designate each tract as belonging to a named or unknown owner, though all the land in the district was thus covered.[2]

§ 13. Signatures and Verification.—To confer jurisdiction upon a board of supervisors, there must be presented to it a petition by "the holders of title or evidence of title representing one-half or more" of the land to be embraced within a proposed reclamation district.[3] When a petition is signed by the requisite number of owners it is immaterial that there are other owners within its proposed boundaries who have not signed it.[4] But when a petition by a less number is presented the board cannot confer jurisdiction on itself by excluding acreage from the district so as to make the petition represent the proper amount of land.[5] Signatures of land owners to a petition for the formation of a reclamation district, made by their authorized

old one, under Pol. Code, § 3481); Ralston v. Board of Supervisors, 51 Cal. 592.

19. Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505.

20. Hagar v. Supervisors of Yolo County, 47 Cal. 222.

1. Stats. 1867–68, p. 514.

2. Hagar v. Supervisors of Yolo County, 47 Cal. 222. But refusing to set aside the proceedings on certiorari where the petitioner did not object to the sufficiency of the petition at the hearing before the board, and large sums of money had been expended in the reclamation project.

3. Pol. Code, § 3446.

4. People v. Hagar, 52 Cal. 171.

5. Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156.

agents, are sufficient.[6] While the administrator of an estate would not be competent as a petitioner, yet where a signature is merely followed by the word "administratrix," without showing that the petitioner was administratrix of any estate, the decision as to her status and capacity is one of fact, upon which the decision of the board of supervisors is conclusive.[7] The statute requires the petition to be verified.[8]

§ 14. Publication.—Section 3447 of the Political Code requires that the petition "be published for two weeks preceding the hearing thereof in some newspaper of general circulation published in the county . . . together with a notice of the time when said petition will be presented to the board of supervisors."[9] This requirement is jurisdictional,[10] and a noncompliance therewith destroys the district's right to exist as a de jure corporation.[11] The petition must be published exactly as presented to the board of supervisors.[12] Publication once a week for the statutory period is a sufficient compliance with the law, though publication is made in a daily, and not a weekly, newspaper.[13] It is necessary, however, that pub-

6. People v. Reclamation Dist No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

7. Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156.

8. Pol. Code, § 3447.

9. Pol. Code, § 3447, as amended in 1917. See, however, Laguna etc. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933, intimating that the constitutional requirement of due process of law may not apply to the organization of reclamation districts so as to necessitate notice and a hearing.

10. Reclamation Dist. No. 765 v. McPhee, 13 Cal. App. 382, 109 Pac. 1106.

11. McPhee v. Reclamation Dist., 161 Cal. 566, 119 Pac. 1077. See infra, § 18, as to collateral attack on existence of district because petition was not published for required period.

12. Ferran v. Board of Supervisors, 51 Cal. 307, holding the petition as published must not omit the name of a land owner contained in the original petition.

13. People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

lication be made at least once in every seven-day period during four of such periods.[14]

The code requires that an affidavit of publication be filed with the petition.[15] The affidavit may be taken by a county clerk. But in that event it is not necessary that it appear from the jurat in which capacity he acted, that is to say, whether he acted as county clerk, or as ex-officio clerk of the superior court or of the board of supervisors. If the jurat is defective, it will be presumed, if necessary, that the board of supervisors took evidence to supplement it and to show that in fact the oath was duly administered.[16]

§ 15. Hearing and Determination. — Inasmuch as the establishment of a drainage district does not affect the property of any person, even within its boundaries, or deprive anyone of his property, but merely authorizes the corporation to discharge the public purposes for which, as a state agency, it was created, it would seem that notice and a hearing are not constitutionally prerequisite to the creation of the district.[17] Under the provisions of the Political Code,[18] however, the board of supervisors, after publication of the petition, are to accord a hearing on it. On such hearing they may rectify the boundaries of the proposed district, on notice to omitted land owners, and if they find that the statements of the petition are correct, "they must make an order approving the same." The order must recite the exterior boundaries of the district as formed, and must be indorsed on or attached to the petition, which is then to be recorded.[19] The fact that

14. Williams v. Sacramento County, 58 Cal. 237.

15. Pol. Code, § 3447.

16. Reclamation District v. Snowball, 160 Cal. 695, 117 Pac. 905, 118 Pac. 514. See AFFIDAVITS, vol. 1, p. 665.

17. Laguna etc. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933 (decided under the act of 1885—Stats. 1885, p. 204—which, however, is substantially the same in its provisions as the Political Code).

18. Pol. Code, § 3449, as amended by Stats. 1917, p. 1192.

19. Pol. Code, §§ 3449, 3450. See infra, § 19, as to collateral attack.

a statute may not in terms authorize a board to deny a petition does not affect its validity if that power is necessarily implied from its provisions, as when the act requires the board to make out and file its determination. Likewise an act is not invalid because it does not in direct terms require a finding by the board of supervisors that the formation of a drainage district would be a public benefit. In the first place, the benefit of drainage to the public is a matter of common knowledge, and, in the second, the benefit to the land owners themselves is sufficient to sustain the statute.[20]

§ 16. Review and Control of Determination.—It has been repeatedly held that the formation of a reclamation district is not a judicial,[1] but a legislative act,[2] carried out in the exercise of the police or taxing power of the state.[3] But it does not follow that where the legislature delegates its power to a local board and provides that it can be exercised upon certain conditions and upon the ascertainment of certain facts, that the act itself becomes legislative in the sense that its due performance may not be controlled by the courts,[4] or reviewed upon certiorari.[5] So also if a board should arbitrarily refuse to form a dis-

20. Van de Water v. Pridham, 33 Cal. App. 252, 164 Pac. 1136, upholding Stats. 1903, p. 354. This act was amended by Stats. 1915, p. 359, and repealed by Stats. 1919, p. 731, by which a substitute measure was enacted and later amended by Stats. 1921, p. 894. The latter statute expressly authorizes the supervisors to "grant or deny" the petition, and also requires the resolution granting the petition to state that the organization of the district will promote the health, safety, convenience or welfare of the public.

1. Williams v. Board of Supervisors, 65 Cal. 160, 3 Pac. 667 (holding the board's order not reviewable on certiorari).

2. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582; Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225; Williams v. Board of Supervisors, 65 Cal. 160, 3 Pac. 667. See supra, § 6.

3. Williams v. Board of Supervisors, 65 Cal. 160, 3 Pac. 667. See supra, § 4.

4. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582.

5. See CERTIORARI, vol. 4, p. 1073; COUNTIES, vol. 7, p. 451.

trict when the petitioners have brought themselves fully within the law authorizing it, mandamus will lie.[6] On the other hand, however, the prospective determination of a board acting within the scope of its powers cannot be interfered with by injunction, as section 3423 of the Civil Code declares that an injunction cannot be granted to prevent a legislative act by a municipal corporation.[7] Inasmuch as the appellate jurisdiction of the superior court is limited by the constitution to cases arising in justices' and other inferior courts, the legislature cannot authorize an appeal thereto from the action of a board of supervisors;[8] and since the proceedings for the formation of reclamation districts are special proceedings, the supreme court has not, under the constitution, any appellate jurisdiction of them.[9] The Political Code provides for an action by the trustees to test the legality of the district's existence.[10]

§ 17. Conclusiveness of Determination.—Jurisdiction to determine the matters alleged in a petition for the formation of a reclamation district is vested, in the first instance, in the board of supervisors. But the determination is not exclusive, or beyond the reach of a reviewing court, where the existence of the jurisdictional facts are found, in flat contradiction of undisputed evidence, for exemption from judicial interference applies to them only so far as their legislative discretion extends but no further.[11] But where the board of supervisors acquires jurisdiction, it necessarily passes upon the truth of the

6. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582, holding also that in the mandamus proceeding the hearing is not de novo, but must be upon the same evidence as that presented to the board. See MANDAMUS.

7. Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225. See INJUNCTION.

8. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582, construing Stats. 1893, p. 174. See COURTS, vol. 7, pp. 700, 701.

9. Bixler's Appeal, 59 Cal. 550; Bixler v. Parvin, 59 Cal. 557.

10. Pol. Code, § 3453.

11. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582.

averments in the petition in determining whether to grant or refuse it. And its judgment establishing the district, upon conflicting evidence, is conclusive as to the truth of the facts alleged.[12] The principle involved is that of res judicata, and the remonstrant is concluded on that ground, and not because his attack on the board's order is collateral, or because the district is a de facto corporation.[13] Among the facts thus conclusively determined are the following: that the lands included in the district are in fact swamp and overflowed lands,[14] that they will be benefited by reclamation,[15] that they have not always been reclaimed,[16] that a survey and subdivision of swamp-lands, or their segregation as such by state or federal authority, has been made, when required,[17] that the petitioners held certificates of purchase and other evidences of title,[18] that the petition has been sufficiently signed,[19] and that the signatures are genuine.[20] But an order creating a

12. Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225; Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887; Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156; People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085; Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; People v. Hagar, 66 Cal. 59, 4 Pac. 951; People v. Hagar, 52 Cal. 171.

13. Lower Kings River Reclamation Dist. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335. See JUDGMENTS, as to principle of res adjudicata in general.

14. Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887; Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; People v. Hagar, 52 Cal. 171. See Hagar v. Supervisors of Yolo County, 47 Cal. 222, holding a party to be estopped to deny his land is swamp-land where he expressly admitted it at the hearing before the board.

15. People v. Hagar, 66 Cal. 59, 4 Pac. 951 (in which the authoritative decision of the district trustees and assessment commissioners as to the propriety of an assessment is also regarded as an element in the conclusiveness of the assessment). People v. Hagar, 52 Cal. 171.

16. Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225.

17. People v. Hagar, 52 Cal. 171.

18. People v. Hagar, 52 Cal. 171.

19. Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156.

20. People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

reclamation district does not have the far-reaching effect of placing beyond the reach of legal questioning an assessment of the lands not yet made, as not proportioned according to benefits.[1]

§ 18. Creation by Special Act and by Implication.—Drainage and reclamation districts may be created by special acts of the legislature,[2] as they are neither private nor municipal corporations within the inhibitions of the provisions forbidding the creation of such corporations in that manner.[3] Such an act is a public statute,[4] and must be deemed to have been enacted for the public benefit.[5] In passing such an act the legislature is not bound to follow the procedure laid down in the general law governing reclamation districts. It may adopt such procedure as it deems necessary or expedient, and may define the manner and plan by which the contemplated work shall be carried out.[6] So also the legislature is conclusively presumed to have taken such evidence as is necessary to enable it to act properly, and the legislation will not be held void as denying due

1. Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335.

2. Reclamation District v. Superior Court, 171 Cal. 672, 154 Pac. 845; Gallup v. Sacramento etc. Drainage Dist., 171 Cal. 71, 151 Pac. 1142 (holding the Sacramento and San Joaquin drainage district is a corporation which the legislature had power to create); Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866; Reclamation District v. Gray, 95 Cal. 601, 30 Pac. 779. As to special laws in general, see CONSTITUTIONAL LAW, vol. 5, p. 793.

3. People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. See infra, § 9.

4. Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 Pac. 1024; Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 154 Pac. 845.

5. Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 154 Pac. 845, holding, therefore, that section 3423 of the Civil Code applies, which prohibits the granting of an injunction to prevent the execution of a public statute by officers of the law for the public benefit.

6. Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 Pac. 1024; Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 154 Pac. 845.

process of law because owners of property affected are given no further hearing.[7]

The corporate existence of a reclamation district may be established by legislative implication.[8] A statute validating the organization of a district is a legislative recognition of its existence.[9] And where the legislature, by special statutes passed subsequently to the formation of a reclamation district, has provided that warrants "drawn or to be drawn" by the trustees, and delinquent assessments "levied or to be levied," shall bear interest,[10] such legislative acts are a distinct and unequivocal recognition of the district, in order to give effect to which it is essential that it remain a corporation; and hence they are sufficient to establish, by implication, its existence as a public corporation, whatever defects there may have been in its original formation.[11]

§ 19. Direct and Collateral Attack.—The right of a de facto reclamation district to exist may be challenged in quo warranto proceedings brought as provided by section 803 of the Code of Civil Procedure.[12] While it is the rule, in the absence of statute to the contrary, that the right of the state to question the existence of such district is not affected by lapse of time,[13] it is expressly provided in California that no action for that purpose shall be brought against a district that has in good faith acted as such for

7. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207.

8. Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866; Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779; People v. Reclamation Dist. No. 108, 53 Cal. 346.

9. Reclamation District v. Gray, 95 Cal. 601, 30 Pac. 779, holding that a reclamation district, though improperly organized, becomes a public corporation from the date of a legislative act validating its organization.

10. Stats. 1871–72, pp. 696, 776.

11. People v. Reclamation Dist. No. 108, 53 Cal. 346.

12. Jaques v. Board of Supervisors, 24 Cal. App. 381, 141 Pac. 404. As to de facto corporations generally, see CORPORATIONS, vol. 6, p. 654.

13. People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

five years.[14] A judgment in quo warranto determining that a reclamation district had no legal existence would not affect the validity of an assessment previously levied by it.[15]

Collateral attack.—While open to assault in quo warranto, the legality and regularity of the proceedings leading up to the formation of a reclamation district which has attained a de facto existence, cannot be collaterally assailed.[16] Thus such a collateral attack cannot be made on the ground that the petition for the formation of the district was not signed by persons representing the requisite amount of lands,[17] nor on the ground that the petition was not published for the required period,[18] nor because the supervisors, in approving the petition, also found that certain lands had been improperly included.[19] The rule is equally applicable to a district created by special act valid on its face.[20] An attack made in an action by a district to recover an assessment levied by it,[1] or in an action by it to enforce payment on a contract for the purchase of its bonds,[2] is collateral within the meaning of

14. Pol. Code, § 3453, as amended by Stats. 1917, p. 1192.

15. McPhee v. Reclamation District, 161 Cal. 566, 119 Pac. 1077.

16. McPhee v. Reclamation District, 161 Cal. 566, 119 Pac. 1077 (overruling Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156); Reclamation District v. Turner, 104 Cal. 334, 37 Pac. 1038 (as in a suit to recover an assessment); Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866 (as in an action to recover an assessment levied upon land by a de facto district; Reclamation District v. Gray, 95 Cal. 601, 30 Pac. 779; Hoke v. Perdue, 62 Cal. 545; Reclamation District No. 765 v. McPhee, 13 Cal. App. 382, 109 Pac. 1106; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277; Hoke v. Perdue, 2 Cal. Unrep. 116. See CORPORATIONS, vol. 6, p. 660.

17. Hoke v. Perdue, 2 Cal. Unrep. 116.

18. Reclamation Dist. No. 765 v. McPhee, 13 Cal. App. 382, 109 Pac. 1106.

19. Reclamation District v. Gray, 95 Cal. 601, 30 Pac. 779.

20. Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

1. Reclamation District v. Turner, 104 Cal. 334, 37 Pac. 1038; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. See cases cited, supra, this section.

2. The fact that the defendant's bid for the bonds was contingent

the rule. This rule does not, however, go so far as to prevent a person from denying the existence of an alleged district either de jure or de facto.[3]

§ 20. What Constitutes a De Facto Organization.—A corporation de facto exists when a number of persons have in good faith organized and acted as a corporation.[4] Just how much business must be done or what facts showing good faith are necessary to constitute the corporation a de facto organization, can be determined by no fixed rule.[5] It is not necessary that some particular period of time should elapse in order to show a de facto existence. Such existence depends rather upon what has been done under and by virtue of the organization than upon the length of time which may elapse after its inception.[6] A de facto district is formed within the meaning of the rule where a petition for the formation of a reclamation district, alleged to contain jurisdictional defects, is approved by the supervisors, and all the subsequent steps are regularly taken, and where trustees are elected, reclamation work undertaken, indebtedness incurred and money expended, and where the right of the district to exist as such is continu-

on their validity would permit him, in an action upon the contract, to raise the legality of any proceeding which was so defective as to invalidate the bonds; but as the bonds of a de facto district impose a lien on its property, he cannot question the legality of its existence or organization. Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505.

3. McPhee v. Reclamation District, 161 Cal. 566, 119 Pac. 1077; People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27 (holding that where the people, in quo warranto, claim the existence of a previous de facto district embracing the lands in defendant's boundaries, defendant may show the nonexistence of such de facto district); Reclamation Dist. No. 765 v. McPhee, 13 Cal. App. 382, 109 Pac. 1106. See CORPORATIONS, vol. 6, p. 662.

4. Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368, quoted in Reclamation District v. McPhee, 13 Cal. App. 382, 109 Pac. 1106; Jaques v. Board of Supervisors, 24 Cal. App. 381, 141 Pac. 404. See CORPORATIONS, vol. 6, p. 656.

5. People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27.

6. Reclamation Dist. No. 765 v. McPhee, 13 Cal. App. 382, 109 Pac. 1106.

ally asserted.[7] But no such district is formed where after the approval of the petition nothing is done except to appoint certain officers.[8]

§ 21. Officers of Districts in General.—The managing board of a reclamation district organized under the Political Code consists of three trustees,[9] elected by the land owners, who have one vote for each dollar's worth of property owned.[10] This is not an exercise of the elective franchise within section 24 of article I of the constitution forbidding a property qualification for voters,[11] and therefore such a statutory provision is valid.[12] The theory is that the business of the district is local in character, and the legislature permits the land owners to appoint their own agents. The method imposed upon them in the selection is wholly within legislative control, the legislature not being compelled to give the land owners any voice at all in the matter.[13] Districts may, however, be formed without trustees.[14] A land owner within a reclamation district may act as trustee where reclamation works are in course of construction or repair, even though he may be specially benefited thereby. Especially is this true where the land owner does not become trustee until after the

7. Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505. See, also, Reclamation Dist. No. 765 v. McPhee, 13 Cal. App. 382, 109 Pac. 1106, holding that when a petition for the formation of a reclamation district is filed with the supervisors and published for an insufficient period of time, but upon the hearing the petition is granted and the district ordered formed, and the property owners thereupon elect trustees, and other proceedings, regular in form, are had, terminating in an assessment, enough is shown to constitute the district a de facto corporation.

8. People v. Reclamation District, 130 Cal. 607, 63 Pac. 27.

9. Pol. Code, § 3453. See infra, § 64, as to status of trustees as public officers.

10. Pol. Code, § 3491.

11. People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016. See ELECTIONS.

12. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207; People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016.

13. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207.

14. Pol. Code, §§ 3472, 3473.

contract for the work has been made.[15] Indeed, under the amendment made in 1917 to section 3454 of the Political Code,[16] the trustees must be record owners of lands within the district, or duly authorized representatives of corporations which are owners of record.

There is no constitutional objection to a statute requiring the surveying of the line of proposed ditches to be done by a county surveyor. In the first place, the constitutional provision forbidding persons in one department of the government from exercising functions appertaining to the others has no application to local governments, and in the second place, the duties imposed are purely ministerial.[17]

§ 22. Function and Proceedings. — The duties of the trustees are elaborately set forth in section 3454 of the Political Code as amended in 1917,[18] to which reference should be made. The functions of the trustees are not confined merely to the construction of the works necessary to prevent the overflow and secure the drainage of the lands within the district. The district is a permanent agency organized to keep the land protected. The trustees constitute a continuing board charged with the duty of carrying on the affairs of the district, operating its pumps and other machinery, when necessary, and keeping in repair the levees and ditches. In this respect they are a governing body similar, in respect of district affairs, to a city council with regard to municipal affairs. They must raise revenue sufficient to enable them to discharge these

15. Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. 1091. See infra, § 23, as to dealings between trustee and district.

16. Stats. 1917, p. 1192. See Deering's Consolidated Supp. to Codes and Gen. Laws, 1917–1921, p. 547.

17. Holley v. County of Orange, 106 Cal. 420, 39 Pac. 790, upholding Stats. 1881, p. 15. This act was afterwards held unconstitutional on other grounds in Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459.

18. Stats. 1917, p. 1193. See Deering's Consolidated Supp. to Codes and Gen. Laws, 1917–1921, pp. 548–551.

duties.[19] While the act of March 28, 1868, did not so require,[20] the Political Code, now requires the board to elect a secretary who shall "keep the minutes of all meetings."[1] And while it was formerly the duty of the board of trustees of a reclamation district to collect assessments,[2] at the present time all assessments are collected by the county treasurer or by an agent, for that purpose designated by the board of trustees.[3]

§ 23. Dealings by Officers With District.—Section 3454 of the Political Code, as amended in 1917, provides in part that all claims by trustees for services rendered or expenses incurred shall be presented to the board, and no trustee shall be disqualified from participating in any and all proceedings of the board, except that he shall not cast the deciding vote upon a motion or resolution approving a claim or awarding a contract in favor of himself. Even prior to the adoption of this provision it was held that in the absence of actual fraud, the claim of a trustee might be allowed and included in the indebtedness of the district for which an assessment was ordered, if the majority remained uninterested and capable of acting in the premises.[4] It was held, however, that where two of

19. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635; Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. 1091. As to repairs, see infra, §§ 63, 64.

20. Stats. 1867–68, p. 507; Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676, holding the proceedings of the board under the act of 1868 could be shown by oral evidence.

1. Pol. Code, § 3454, subd. 3, as amended in 1917. But even before the amendment the code evidently contemplated written minutes or written record of the board's proceedings. See Pol. Code, §§ 3466, 3480.

2. Angus v. Browning, 130 Cal. 502, 62 Pac. 827. Cited in Hershey v. Reclamation District, 162 Cal. 401, 122 Pac. 1074.

3. See infra, § 47.

4. Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887. See, also, Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. 1091, holding the fact that a member of the board acted as overseer for the contractors doing reclamation work would not invalidate an assessment, where

the three trustees were privately interested as owners of existing reclamation works, the action of the board in directing their purchase was void, even though each was interested in a separate portion of the works.[5] Since the latter decisions radical changes have been made in the proceedings, and it is now expressly provided that no trustee shall be disqualified to approve plans because of his ownership of any levee or other reclamation works included therein.[6]

§ 24. By-laws.—After the approval of the petition for the formation of a reclamation district by the board of supervisors, by-laws are to be adopted by the land owners, or those representing a majority of acreage in the district, "not inconsistent with the laws of the state, for the government and control of the affairs of the district."[7] The by-laws which the district is authorized to adopt are such as may be deemed necessary to effect the work of reclamation and keep it in repair.[8] By-laws in conflict with statutory law are, of course, void. Thus a by-law of a reclamation district forbidding the trustees to allow in-

his claim for services was not allowed until after the statement and report to the supervisors for fixing the amount of the assessment was filed.

5. Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170; Reclamation District v. Turner, 104 Cal. 334, 37 Pac. 1038. Compare Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887, holding that the fact that funds arising from a previous assessment were used by the trustees to pay themselves for rights of way purchased by them for the district, at the same rate paid other land owners, would not vitiate a subsequent assessment.

6. Pol. Code, § 3455, as amended in 1911. See Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598, holding that the mere fact that trustees of a reclamation district purchase for it private works of reclamation owned by themselves does not, on collateral attack, create any presumption, apart from the circumstances surrounding the transaction, that it was illegal or characterized by fraud. See supra, § 21.

7. Pol. Code, § 3452; People v. Hagar, 52 Cal. 171, construing the act of March 28, 1868 (Stats. 1867–68, p. 507) as to the proper persons to adopt by-laws.

8. Reclamation District v. Hagar, 66 Cal. 54, 4 Pac. 945.

debtedness to accrue in excess of the assessment levied, is in conflict with a statute[9] authorizing additional levies to be made, upon revised estimates, if the original taxes should be insufficient, and is void.[10] So a by-law forbidding the trustees to contract indebtedness in excess of the assessment levied is superseded by a subsequent legislative enactment allowing further assessments for work already done.[11] And a by-law allowing an assessment to be made for work done before the board of trustees was in existence is in conflict with the Political Code, and void.[12] A provision in the by-laws of a reclamation district fixing the day on which regular meetings of the board of trustees shall be held and prescribing the notice to be given for special meetings is not so vital that a failure to observe it will, in the absence of fraud or the actual exclusion of members of the board from participation in its deliberations, vitiate an assessment. The object of such a provision is merely to guarantee the proper observance of the greater and paramount consideration involved in all reclamation schemes authorized by the state, namely, that the business for which the districts have been formed shall be faithfully transacted and their purpose finally accomplished by those charged with that duty.[13] Under section 3452 of the Political Code, providing that the land owners of a reclamation district shall adopt by-laws which "may be amended at any time in the same manner that the original by-laws were adopted," the board of trustees has no power to amend the by-laws.[14]

9. Act of March 28, 1868, § 34.

10. Reclamation District v. Hagar, 66 Cal. 54, 4 Pac. 945; Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366, 6 Sawy. 567.

11. Hagar v. Board of Supervisors, 51 Cal. 474.

12. Swamp and Overflowed Land Dist. No. 110 v. Feck, 60 Cal. 403.

13. Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

14. Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

III. ASSESSMENTS.

Nature, Validity and Preliminary Procedure.

§ 25. In General.—The legislature has power to create districts for the reclamation and drainage of lands,[15] and to authorize the levying of assessments to carry on the work.[16] A swamp-land assessment is a charge imposed upon property by authority of the legislature, and the fact that it is only a lien upon the property assessed and not a direct charge against the owner is immaterial.[17] It is a liability created by statute,[18] and is a species of tax.[19] Because of the latter fact the rule that taxation laws are to be strictly construed and pursued is applicable to reclamation assessments.[20] Yet while such assessments represent an exercise of the taxing power of the state,[1] they are not taxes in the strict sense of the term, since taxes, strictly speaking, are levied ad valorem while assessments are apportioned to benefits conferred.[2] And they do not have the character of a tax so as to be collectible by execution or levy upon the general property of the owner of the land assessed.[3]

15. See supra, § 6.

16. See supra, § 7.

17. People v. Hulbert, 71 Cal. 72, 12 Pac. 43; Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338.

18. Miller & Lux v. Batz, 131 Cal. 402, 63 Pac. 680; People v. Hulbert, 71 Cal. 72, 12 Pac. 43.

19. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635; Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598; Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338.

20. Reclamation Dist. No. 730 v. Hershey, 169 Cal. 793, 148 Pac. 185; Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598. See infra, § 26, as to general rule governing invalidity of assessment.

1. Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338.

2. Holley v. County of Orange, 106 Cal. 420, 39 Pac. 790, holding that a drainage assessment levied under the act of March 3, 1881 was not a tax within the meaning of subdivision 13 of section 20 of the County Government Act of 1883, which denied power to the supervisors to levy a tax until submitted to the voters.

3. Atchison etc. Ry. Co. v. Reclamation Dist. No. 404, 173

A provision of a special statute creating a reclamation district[4] to the effect that the management and control of said district shall be subject to the laws relative to reclamation districts formed under the provisions of the Political Code, is broad enough to confer the power of assessment, as provided therein.[5] So also since the amendment of section 3478 of the Political Code in 1911, reclamation districts formed under the provisions of any statute are governed in this respect by the Political Code.[6]

§ 26. Purpose and Validity.—The law gives reclamation districts no power to levy assessments except for purposes of reclamation.[7] The cost of work already done before the district was organized and the board of trustees was in existence cannot be included in an assessment.[8] But under section 3459 of the Political Code, providing for additional assessments where the original was insufficient, a further assessment may be levied to pay for work already done under the original plan of reclamation, and is not limited to payment for work to be done in the future.[9] Assessments may also be levied for the purpose

Cal. 91, 159 Pac. 430. See infra, §§ 47 to 58, inclusive.

4. Stats. 1905, p. 717, § 2.

5. Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170.

6. Formerly any such district must have proceeded under the statute to which it owed its existence. Swamp Land Dist. No. 121 v. Haggin, 64 Cal. 204, 30 Pac. 631; Reclamation Dist. No. 3 v. Kennedy, 58 Cal. 124.

7. Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668; Finnan v. Reclamation Dist. No. 273, 26 Cal. App. 714, 148 Pac. 227, 152 Pac. 1197. See Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866 (holding an assessment is not invalid because it includes such an item as the cost of erecting and maintaining a pump). See also, Reclamation District v. Hagar, 66 Cal. 54, 4 Pac. 945; Reclamation District No. 108 v. Hagar, 4 Fed. 366, 6 Sawy. 567, decided prior to the amendment of section 3466 of the Political Code in 1915, and where assessments were still collected by suit, and holding that the expense of such collection, including attorney's fees for prosecuting suits, was properly included in the assessment as incidental expense.

8. Swamp and Overflowed Land Dist. No. 110 v. Feck, 60 Cal. 403.

9. Hagar v. Board of Supervisors, 51 Cal. 474.

of providing funds for maintenance and repair of reclamation works.[10] A levy for the latter purpose bears a close resemblance to taxes levied for the expenses of a city or county.[11]

The method of assessment prescribed by the law creating reclamation districts must be observed with substantial strictness, or any assessment levied will be abortive.[12] Yet it does not follow that any minor ministerial or administrative defect not involving any substantial right will be fatal.[13] The policy of the law should be to discourage objections made on wholly technical grounds,[14] and it will be satisfied with a substantial compliance with the provisions governing the organization of reclamation districts and the administration of their affairs.[15] The validity of an assessment made by a reclamation district after validation of its organization by the legislature is not affected by the fact that the assessment was based on proceedings

10. Pol. Code, § 3456, subd. b, as amended in 1917 and in 1919. See Swamp Land Reclamation Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389, holding that if the original works of reclamation are of such a nature that other work must be done continuously, or from year to year, to maintain them or make them effective, other assessments may be made upon the lands of the district, under section 3459 of the Political Code, from time to time, to obtain funds for that purpose.

11. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635; Swamp Land etc. Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389.

12. Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598; Silva v. Reclamation Dist. No. 1001, 41 Cal. App. 326, 182 Pac. 786. See supra, § 19, as to effect on validity of assessment of judgment in quo warranto that district has no legal existence. See supra, § 23, as to effect on validity of assessments of dealings by trustees in their private capacity with the district they represent as officials. See supra, § 24, as to nonobservance of by-law as affecting validity of assessment. See infra, § 43, as to additional assessment where original was invalid.

13. Reclamation Dist. No. 730 v. Hershey, 169 Cal. 793, 148 Pac. 185; Silva v. Reclamation Dist. No. 1001, 41 Cal. App. 326, 182 Pac. 786.

14. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635;

15. Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

and data, surveys, plans and estimates, had previously, as such matters are merely in the nature of evidence.[16] The misappropriation of the funds of the district by the trustees cannot have the effect of invalidating the assessment by which the funds were raised, as such act has nothing to do with the matter of levying it.[17] And the adjudication that an assessment of a particular tract in a reclamation district is void will not invalidate the assessment as a whole.[18]

§ 27. Plans and Statements.—It is the duty of the board of trustees of a district to employ engineers and others to survey, plan, locate and estimate the cost of work necessary to reclaim the lands of the district, and "thereafter at any time, [to] modify or change such original plan or plans, or adopt new, supplemental, or additional plan or plans" when necessary.[19] And it must report to the board of supervisors every original plan, and every supplemental, or additional plan, if any, together with estimates of the cost.[20] If the district is located within the Sacramento and San Joaquin drainage district, a copy of the plans must be certified to the state reclamation board.[1] These provisions are mandatory.[2] While

16. Reclamation District v. Gray, 95 Cal. 601, 30 Pac. 779.

17. Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598. And see Pol. Code, § 3463, as amended by Stats. 1917, p. 1206 and Stats. 1919, p. 610, providing that no subsequent act or conduct of the trustees, after an assessment has become a lien, shall invalidate it.

18. Reclamation District v. Bonbini, 158 Cal. 197, 110 Pac. 577.

19. Pol. Code, § 3454, subd. 6.

20. Pol. Code, §§ 3454, subd. 13, 3455 (as the latter section was amended by Stats. 1917, p. 1197, and Stats. 1919, p. 604, three copies are to be filed if the district is within the Sacramento and San Joaquin Drainage District, and two if it is outside).

1. See Pol. Code, § 3455, as amended by Stats. 1917, p. 1197, and Stats. 1919, p. 604. See Silva v. Reclamation Dist. No. 1001, 41 Cal. App. 326, 182 Pac. 786, holding that where a plan of reclamation was adopted by trustees of a reclamation district before the creation of the state reclamation board, a subsequent modification or addition thereto need not be submitted to the board where it is not of vital importance.

2. Reclamation Dist. No. 730 v.

the statute provides for the amendments and modifications of plans submitted to the reclamation board,[3] the boards of supervisors have no such power,[4] but must appoint assessment commissioners.[5]

Necessity when additional assessments are made.—If the original assessment made to defray the expense of the work proves insufficient, or if further assessments are required for its protection, maintenance and repair, the trustees must present to the supervisors "two copies of the plan of reclamation and a statement of the work done or to be done, and its estimated cost," and the same proceedings are had thereon as on an original plan.[6] While this section formerly provided merely for a statement of the work and its estimated cost, it now requires a "statement of the work done or to be done."[7] This provision negatives the theory that the land owners are entitled to the advice of the board of supervisors before any new work is done. And under it the board of trustees may make repairs, without a preliminary statement or plan made to the supervisors.[8]

Hershey, 169 Cal. 793, 148 Pac. 185; Reclamation District v. Bonbini, 158 Cal. 197, 110 Pac. 577.

3. Pol. Code, § 3455, subd. a, 4.

4. Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. 1091. See infra, § 31.

5. See infra, § 32.

6. Pol. Code, § 3459, as amended by Stats. 1917, p. 204, and Stats. 1919, p. 610. (Prior to these amendments, the copies of the plan of reclamation were not required by this section.) Swamp Land etc. Dist. v. Blumenberg, 156 Cal. 532, 106 Pac. 389.

7. Reclamation Dist. No. 730 v. Hershey, 169 Cal. 793, 148 Pac. 185; Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676, holding that a statement prepared and presented to the board of supervisors by the attorney of the board of trustees, under the direction of one member thereof acting by its authority, the statement itself containing such matters as had been agreed upon by the board, and being signed by the attorney in the name of the board member as secretary, is sufficient within the meaning of such a statute as that set forth in the text.

8. Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. 1091. See Pol. Code, § 3456, as amended by Stats. 1917, p. 1198, and Stats. 1919, p. 607, providing a new and complete method of additional assessments for maintenance, repair and incidental expenses. See infra, § 30.

§ 28. Sufficiency and Requisites in General. — Plans, statements and estimates, as a basis for an assessment, should be sufficiently definite to enable the land owners to ascertain the specific purpose of the assessment, the real utility of the contemplated improvements, and the probable consequences, as regards benefits or detriment, which will result.[9] And the board of supervisors should not approve an assessment unless the law has been substantially complied with in this respect. Until the assessment has been approved and collected, and final contracts for the work let, it would be impracticable and extremely difficult for the trustees to state in minute detail the nature of each item of work proposed, the exact cost, and its precise location. Yet the reports, plans and estimates should be sufficiently definite to enable interested persons, from their own knowledge of existing conditions, or by personal inspection, to understand with reasonable certainty the work proposed and its cost.[10] It is difficult to draw a line of certainty and fullness of detail to which such statements must conform. It is not necessary that the plans or statements should have the certainty and completeness necessary in a contract for the work, or to enable a contract to be let on them, but only enough to show the purpose to which the money will be applied, and the extent and character of the proposed work.[11] Moreover, trifling and beneficial deviations from the plans will not vitiate an assessment, a measure of discretion being reposed in the trustees in carrying out the plans.[12]

Defects.—Defects in the plans of work reported by the trustees do not affect the jurisdiction of the supervisors to order an assessment. Indeed, such imperfections are evi-

9. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840; Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763.

10. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840.

11. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635; Silva v. Reclamation Dist. No. 1001, 41 Cal. App. 326, 182 Pac. 786.

12. Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676.

dently contemplated by the code, as it provides for "new, supplemental or additional plans."[13]

§ 29. **With Reference to New Work.**—As already stated the law contemplates the adoption by the trustees of clear and definite plans of new work.[14] When the excavation of canals is planned, the amount of excavation is the important thing, and it is not necessary to state specifically the surface width or slope of such canals if sufficient data is given from which they can be computed. So also a statement of the cost of "12-inch pump, electrical motors, transformers, housing and installation complete," is sufficient.[15] If a report is otherwise sufficient, it is immaterial that the ditches and pumping plant are not located.[16] In a statement of work "to be done" as a basis for an additional assessment, it is not necessary that the trustees should specify the work already done.[17] But they should state the work to be done as clearly and definitely as in the case of original plans for new work. For example, if the construction of a system of drainage ditches is contemplated, the statement should show in some detail and with some degree of certainty the extent and character of the proposed work and the general location of the proposed ditches. So also where the repairing and raising of certain levees is contemplated the statement should show the extent the levees are to be raised or the amount to be expended for the new work.[18]

13. Reclamation District v. Hersey, 160 Cal. 692, 117 Pac. 904, holding an omission in plans reported by the trustees, to provide for the purchase of certain reclamation works held in private ownership, will not defeat an assessment.

14. See supra, § 27.

15. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635.

16. Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131.

17. Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866.

18. Reclamation District v. Bonbini, 158 Cal. 197, 110 Pac. 577. See Meyer v. Reclamation District No. 17, 172 Cal. 104, 155 Pac. 635, holding that maps and profiles accompanying the statement of new work which show the location and height of existing levees, the height to which it is proposed to raise them, the number of cubic

It is a sufficient plan for an assessment for revetment work, to protect a system of reclamation work, that the report to the supervisors shall state merely the character of the work, and the amount estimated to be necessary to accomplish it,[19] without giving its exact location or the particulars of its construction.[20] A statement specifying "rocking and brushing," and giving the location of the work and its cost, is sufficient, though neither the thickness of the layer of brush, the size of the rocks to be used, nor the width of the space to be covered, is given, being apparently reserved for the discretion of the trustees as the work progresses.[1]

§ 30. With Regard to Work Done and Repairs.—In a statement of "work done" made as a basis for an assessment for payment thereof, it is not necessary that the statement include all the work previously done, but only that portion which remains unpaid for, and for the payment of which the assessment is sought.[2] And in the statement of such work elaborate and specific details as to the location and dimensions are not required,[3] it being sufficient to give such a description as will identify them.[4] So also in the cases of new work to be done on a reclamation, there is nothing in the law which requires the trustees' report and adopted plan to specify by metes and bounds just where a portion of the work already done is

yards required therefor, their top width when so raised, and the cost, are sufficient.

19. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840; Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635.

20. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840.

1. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635.

2. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763.

3. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840.

4. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635. See Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763, holding sufficient a statement reciting an estimate of indebtedness which had "accrued for fuel oil, lubricating oil, services of engineer to operate the pump, and incidentals pertaining to operating said pump."

to be found. Each modification of the original plan does not constitute a wholly separate, distinct and independent plan. The general plan still continues in its entirety, with such changes as experience shows to be necessary.[5]

With reference to repairs.—A statement by the trustees, as a basis for an additional assessment, of "repairs and improvements" to certain reclamation works damaged by flood, which recites that it will be necessary to "widen and strengthen said cross-levee and raise it to a uniform height," and that this will require the excavation of a named amount of sand and earth, at a named cost per cubic yard, is sufficient, even treated as a plan for new work, to sustain the assessment, though the amount of earth to be applied to each phase of the general improvement is not shown.[6] The purchase of a new boiler to replace one that is worn out and inadequate is for a repair. Hence a statement is sufficient without a specification of the capacity of the new boiler.[7]

§ 31. Estimates of Cost.—Section 3455 of the Political Code requires only estimates of cost and incidental expenses. There is no necessity for elaborate details as to the length of time certain persons are to be employed, or their salaries, or the character of their services, or the expense of collecting the assessment. Nor is it necessary that incidental expenses[8] or that the estimated cost of

5. Reclamation Dist. No. 730 v. Hershey, 169 Cal. 793, 148 Pac. 185.

6. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763. And see Reclamation Dist. No. 730 v. Hershey, 169 Cal. 793, 148 Pac. 185, holding that where a plan for new reclamation works refers to drainage ditches shown on an accompanying map by scale and dimensions, and gives a specific estimate of the cost of deepening, widening and repairing them, this is sufficient.

7. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763. See, however, Pol. Codes, § 3459, as amended by Stats. 1917, p. 1204, and Stats. 1919, p. 610, which now requires "plans" to be filed as a basis for additional assessments.

8. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840.

separate phases of the work[9] be segregated. For example, the law permits an estimate of the aggregate sum for acquiring all levees necessary, and another aggregate sum for the construction thereof. This rule does not, however, authorize such an item as "drainage ditches to be dug throughout the district and pumping plants to be installed" at an estimated cost of a certain limit sum, as such an item does not show the amount or character of ditch work to be done, or the location of any proposed ditches, or the cost of this part of the work.[10] The failure to state the estimated cost of the right of way for canals included in a plan does not invalidate the assessment, for it may be that rights of way will be given free of cost, or that the district has other funds available with which to pay for them.[11] An estimate of the cost of purchasing private works, made in the trustees' statement, is not binding, and the trustees and supervisors may afterwards decide to pay more.[12]

§ 32. Appointment of Commissioners of Assessment.— When the plans and statements of the work are reported to the supervisors, they must appoint three commissioners to view and assess upon the land within the district the estimated sum,[13] and apportion the same according to the benefits that will accrue.[14] "The office of assessment commissioner is created by the statute and is a de jure office."[15] The proper body to make the appointment is

9. Reclamation Dist. No. 730 v. Hershey, 169 Cal. 793, 148 Pac. 185.

10. Reclamation District v. Bonbini, 158 Cal. 197, 110 Pac. 577.

11. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635.

12. Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598.

13. Pol. Code, § 3456. (As amended by Stats. 1917, p. 1198, and Stats. 1919, p. 607, this section requires a petition from the trustees to the supervisors for the appointment of assessment commissioners, after the approval of the plans of work by the reclamation board of the Sacramento and San Joaquin Drainage District, where the reclamation district is situated in whole or in part within the drainage district.)

14. See infra, § 35.

15. Reclamation Dist. No. 70 v.

the board of supervisors of the county in which the district or the greater part thereof is situated. This is so even where the district was created by special act of the legislature, and such act directs appointments to be made as provided in the Political Code.[16] Upon the presentation of a statement as a basis for an additional assessment, the supervisors must direct the original commissioners or other commissioners to make such assessment.[17] But it is not the duty of the supervisors to appoint new commissioners after an ineffectual assessment by those first appointed, unless proper proceedings for a new assessment are instituted.[18] Upon making an order for the appointment of assessment commissioners, the board of supervisors is not required to hear testimony.[19] A minute-book of the proceedings of a board of supervisors, showing an order appointing assessment commissioners for a certain reclamation district, is prima facie evidence of the making of the order, as provided in section 1920 of the Code of Civil Procedure, but it is not conclusive. It may be shown by parol evidence that the order related to a certain district, though as originally made it purported, through a clerical error, to concern another district. The fact that it was afterwards altered to conform to the fact does not render it inadmissible in evidence, but goes merely to its weight.[20]

§ 33. **Qualification.**—The assessment commissioners must have no interest in any real estate within the district, and

Sherman, 11 Cal. App. 399, 105 Pac. 277.

16. Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866.

17. Pol. Code, § 3459. See Bixler v. County of Sacramento Supervisors, 59 Cal. 698, holding that the action of the supervisors in making an additional assessment, and in afterwards rescinding the order, is not judicial in its nature, and hence cannot be reviewed by certiorari. See CERTIORARI, vol. 4, p. 1069.

18. Harris v. Board of Supervisors, 49 Cal. 662.

19. Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. 1091.

20. Swamp Land Reclamation Dist. v. Wilcox, 75 Cal. 443, 17 Pac. 241.

each must take an oath to that effect, as well as to perform his duties to the best of his ability.[1] Under this provision, one is not disqualified to act as assessment commissioner merely because he is secretary of the board of trustees, receiving a salary, and owing his appointment and tenure of office to the trustees who own a majority of the lands in the district.[2] If an assessment commissioner is not disqualified at the time of his appointment and qualification, a subsequent disqualification will not invalidate his acts as a de facto officer, nor will his disqualification at that time vitiate an assessment imposed by action of the disinterested majority of the board, in view of section 15 of the Political Code, providing that words giving a joint authority to three or more public officers are to be construed as giving it to a majority of them.[3] Whether or not assessment commissioners come within the requirements of sections 904 and 909 of the Political Code, requiring the taking and filing of an oath of office of all public officials, the failure to file their written oath of office with the county clerk will not vitiate their official acts already fully performed.[4]

Levy, Apportionment and Reassessment.

§ 34. Proceedings of Assessment Commissioners. — Assessment commissioners, upon whom special duties are enjoined by law, must act in strict conformity to the statutes, and any substantial departure from the course marked out will render their acts void.[5] The statute makes it their duty to view and assess upon the land within the district the sum estimated by the trustees as

1. Pol. Code, § 3456.

2. Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 (the court remarking, however, that the appointment was injudicious).

3. Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

4. Swamp Land Reclamation District v. Wilcox, 75 Cal. 443, 17 Pac. 241.

5. Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. 462.

necessary for the work of reclamation, apportioning it according to the benefits that will accrue to each tract, respectively, from the expenditure. The estimate is to be made in gold coin.[6] In acting pursuant to such a provision it is sufficient if the commissioners make such an examination of the land as will enable them to form an intelligent judgment. It is not necessary that they go upon every acre.[7] Nor is it now necessary that they act jointly in making the view,[8] though under the Green Act, it was required that they should "jointly view and assess."[9]

§ 35. Assessment in Proportion to Benefits in General.—Under the provisions of the Political Code, it is the duty of the assessment commissioners to apportion the assessment according to the benefits that will accrue to each tract of land in said district by reason of the expenditure of the sums of money to be raised.[10] They are to be

6. Pol. Code, § 3456.

7. People v. Hagar, 52 Cal. 171 (decided under the act of March 28, 1868, § 33). See Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. 462, holding that if the assessment commissioners view substantially all the land in a district from a vantage point, it cannot be said that the view is insufficient in law, though the lands at the time are mostly covered with water, and a few small parcels are hidden by trees.

8. Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. 462.

9. Act of March 28, 1868, § 33 (Stats. 1867–68, p. 516); Reclamation Dist. No. 3 v. Parvin, 67 Cal. 501, 8 Pac. 43; People v. Ahern, 52 Cal. 208; Harris v. Board of Supervisors, 49 Cal. 667; People v. Hagar, 49 Cal. 229 (holding that the return by the commissioners on the assessment-roll that they had jointly viewed and assessed the land, was not conclusive, or even prima facie evidence of the fact); People v. Coghill, 47 Cal. 361, holding, however, that the fact that one commissioner, absent when the view was had, was already familiar with the land, or that when the assessment was made by two, the third by letter expressed his assent to an assessment then adopted and previously agreed on, would not validate the proceedings.

10. Pol. Code, §§ 3455, subd. b. 2, 3456; Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156; Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389; People v. Hagar, 66 Cal. 59, 4 Pac. 951; Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. See supra, § 7, as to power of state to impose local assess-

guided by the actual amount of benefits, and are not limited in the amount to be levied per acre by any arbitrary maximum or minimum.[11] They have no power to assume that the district will purchase an existing work, and to deduct, accordingly, the value of each portion of it from the assessment of the tract on which it stands, nor to apportion the remaining charge on the basis of acreage without regard to benefits.[12] If they, in their discretion, think that a particular tract of land will not be benefited, they should not charge any assessment upon it, or at least any failure to make a nominal assessment comes within the maxim "de minimis non curat lex."[13] In case of a district created by the legislature, however, all the land therein is conclusively presumed to be land which will be benefited by works of reclamation,[14] and the commissioners, on the one hand, have no power to exempt a portion,[15] while the land owners, on the other, cannot urge against an assessment that their lands will not be benefited.[16]

Where part of a tract is benefited.—If, in the opinion of the assessment commissioners, the land of an individual owner would be benefited in a certain sum by the work of reclamation, it is within their power to spread that amount as an assessment over the entire tract, instead of confining it to the portion of the tract directly affected.[17]

ments. See note 2 A. L. R. 625, as to validity of rules as to apportioning assessment.

11. Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070.

12. Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156.

13. Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676 (assessment made under Green Act); Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes.

14. Miller & Lux, Inc., v. Sacramento etc. Drainage Dist., 182 Cal. 252, 256 U. S. 129; Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

15. Levee District No. 1 of Sacramento County v. Huber, 57 Cal. 41.

16. Miller & Lux, Inc., v. Sacramento etc. Drainage Dist., 182 Cal. 252, 256 U. S. 129; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. See infra, § 57.

17. Roth v. Reclamation Dist. No. 1001, 183 Cal. 447, 191 Pac. 890;

In other words, a finding that certain fragmentary pieces or parcels of a tract are not benefited does not relieve from the necessity of assessing the whole.[18]

Collateral attack.—In the absence of fraud, the action of the assessment commissioners, in determining the amount of benefit to accrue to each parcel, being a matter of discretion, cannot be collaterally attacked.[19]

§ 36. General Principles of Apportionment.—Considerable discretion shall be exercised by the commissioners in the determination of the question as to benefits which will accrue to the several tracts of land included in the district. While an arbitrary assessment cannot be levied, the judgment of the commissioners upon the assessment, after a view of the land as contemplated by the statute, must be presumed to have been the result of a consideration of all the elements necessary to a just apportionment of the assessment.[20] All that is required of the commissioners and all that can be expected of them is that they shall honestly and intelligently investigate the situation, examine the lands and fix such tax upon each piece of land as in their opinion it should properly pay, upon an apportionment of the whole amount to be raised, according to benefits.[1] Absolute equality of assessments according to benefits is not practically attainable, and may be only approximated even by competent and honest commissioners.[2]

Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170.

18. Reclamation District v. Hershey, 160 Cal. 692, 117 Pac. 904; Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170; Roth v. Reclamation Dist. No. 1001, 29 Cal. App. Dec. 732.

19. People v. Hagar, 52 Cal. 171.

20. Payne v. Ward, 28 Cal. App. 553, 153 Pac. 462 (referring to Stats. 1885, p. 204, as amended by Stats. 1891, p. 262, and Stats. 1909, p. 25); Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. See infra, § 39, as to presumption of correctness of assessment.

1. Payne v. Ward, 28 Cal. App. 553, 153 Pac. 462.

2. Lower Kings River Reclamation Dist. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; Hagar v. Reclamation Dist. No. 108, 111

Yet any material overrating of benefits and consequent assessments, injurious to the taxpayer, and not within the maxim "de minimis," may be pleaded and proved in an action to enforce the assessment, whether such overrating be the result of fraud, negligence, or incompetence of the commissioners.[3] Whether the mode of making assessments within reclamation districts is in accordance with proper apportionment, or equality of burden or benefit, is a legislative and not a judicial question, in the absence of a probable violation of private rights.[4] When it is not shown that an assessment was levied upon tracts of land by acreage, the question of how many acres a tract contained is immaterial.[5]

Increase in market value.—The practice of making the increased market value accruing to each tract from the proposed reclamation, the criterion of benefits to be derived, has been commended to assessment commissioners.[6] An assessment so levied is not arbitrary.[7] It is true that an assessment by any other mode of apportionment will be upheld unless the result is clearly unequal and unjust. Yet where it appears that of lands, assessed equally, some would derive no increase whatever in market value from the proposed reclamation, and others would quadruple in value, the disproportion between levy and benefits is so great as to necessitate setting the assessment aside.[8]

U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes.

3. Lower Kings River Reclamation Dist. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335.

4. Reclamation District v. Hagar, 66 Cal. 54, 4 Pac. 945.

5. Swamp Land Dist. v. Glide, 112 Cal. 85, 44 Pac. 451, holding also that an objection that there is a discrepancy between the acreage within a reclamation district, as shown by its exterior lines, and the acreage as shown by the assessment-roll, cannot be considered on appeal for the first time, nor is there any presumption in favor of the accuracy of the former over the latter.

6. Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070.

7. Roth v. Reclamation Dist. No. 1001, 29 Cal. App. Dec. 732.

8. Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070.

§ 37. **What Constitutes Benefit.**—In levying a reclamation assessment the commissioners should take into consideration the condition of the land as it exists at the time of the assessment. Thus they should consider whether any land is already partially protected by existing works, either public or private.[9] If any land is high they may consider whether it will be benefited by having the swampy condition of the near-by lowlands, rectified, the mosquitoes eradicated, and malaria prevented. Such benefits are not "general to the community," so as to make them improper as a basis for assessing the lands involved. Within the meaning of the rule, general benefits are enjoyed as a member of the community and not as the owner of property which is specially benefited.[10] The fact that reclamation works may occasion or allow seepage upon certain lands, is not conclusive that they will not be benefited by the work, for it may be that by small additional expenditure the seepage might be overcome.[11] Of course, the benefits which are to be taken into account by the commissioners are those benefits only which spring from the system of works which such assessment is levied to construct or maintain. And lands in a reclamation district which have not been reclaimed by work already done cannot be assessed equally for it with those lands that have been reclaimed by it, for they have not been equally benefited.[12] That portion of an outstanding indebtedness of a reclamation district, for the payment of which an additional assessment is made, which is classed as "incidentals," may properly be assessed against each acre of land in the district equally.[13]

9. Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070.

10. Payne v. Ward, 28 Cal. App. 553, 153 Pac. 462.

11. Roth v. Reclamation Dist. No. 1001, 183 Cal. 447, 191 Pac. 890.

12. Reclamation Dist. No. 108 v. West, 129 Cal. 622, 62 Pac. 272.

13. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763.

§ 38. Reapportionment on Subdivision of Tract.—By amendments to section 3460 of the Political Code, 1915 and 1917, it is provided that when any tract of land upon which an assessment "shall have been" made shall be subdivided into smaller parcels, the board of trustees of the district shall reapportion the assessment in such manner as to charge each parcel with its just proportion.[14] These amendments have no retroactive effect, and do not apply to assessments made prior to the passage of the amendments, especially in view of the contemporaneous amendment of section 3466 of the Political Code,[15] providing that assessments theretofore made in any reclamation district should be validated and collected in the manner provided by law at the time they were made.[16]

§ 39. Presumption of Performance of Duty by Commissioners.—The presumption is that the assessment commissioners have properly performed their duty, and that the assessment has been properly and justly levied.[17] Though in line with the former provisions of section 3463 of the Political Code, making the assessment list prepared by the commissioners prima facie evidence of the matters contained in it, including the correctness of the assessment, this presumption is not dependent on any statutory provision.[18] It is not conclusive, how-

14. Stats. 1915, p. 1286, and Stats. 1917, p. 1204. See also Pol. Code, § 3454, subd. 17, as amended by Stats. 1917, p. 1193, enumerating the power to reapportion assessments already made in a subdivided tract as among the powers of trustees.

15. Stats. 1917, p. 671.

16. Seale v. Balsdon, 34 Cal. App. Dec. 738, 197 Pac. 971.

17. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763; Swamp Land Reclamation Dist. v. Wilcox, 75 Cal. 443, 17 Pac. 241; Roth v. Reclamation Dist. No. 1001, 29 Cal. App. Dec. 732; Payne v. Ward, 28 Cal. App. 553, 153 Pac. 462 (holding the same presumption of validity as to the assessment arises under the Drainage Act of March 18, 1885 (Stats. 1885, p. 204), and the burden is on him who would assail it); Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

18. Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141

ever, and the land owner may question the fairness of the assessment,[19] in which case, of course, the burden of proof rests upon him.[20] This presumption, under some circumstances, might be, and, no doubt often is, sufficient to support a finding of the propriety and equality of the assessment. But where the commissioners themselves testify as to what they did, there is little room for the application of the presumption.[1]

§ 40. Assessment List in General.—The commissioners of assessment must make a list of the charges assessed against each tract of land.[2] This list must contain: 1. A description of each tract assessed by legal subdivisions, swamp-land surveys, or other boundaries sufficient to identify it. 2. The number of acres in each tract. 3. The names of the owners of each tract, if known; and if unknown, that fact; but no mistake or error in the name of the owner or supposed owner of the tract assessed, and no mistake in any other particular, will render the assessment invalid. 4. The amount of the charge assessed against each tract.[3] A somewhat different list is required in case of an assessment for maintenance, repairs and incidental expenses.[4] The assessment list when completed, is to be filed with the clerk of the board of supervisors.[5] The uses to which land is devoted do not necessarily furnish the criterion for its division into tracts, within the

Pac. 1070; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

19. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763; Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. 462; Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070.

20. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763; Roth v. Reclamation Dist. No. 1001, 29 Cal. App. Dec. 732; Reclamation Dict. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

1. Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070. See APPEAL AND ERROR, vol. 2, p. 933.

2. Pol. Code, § 3460; Reclamation Dist. v. Bonbini, 158 Cal. 197, 110 Pac. 577.

3. Pol. Code, § 3461.

4. Pol. Code, § 3456, as amended by Stats. 1917, p. 1198, and Stats. 1919, p. 687.

5. Pol. Code, §§ 3460, 3462.

meaning of the code.[6] It is not necessary that the list should show on its face that the assessment was made in proportion to the whole expense and the resulting benefits, or that it was estimated in gold coin, or that the commissioners otherwise complied with section 3456 of the Political Code.[7] The omission of a dollar-mark before some of the sums assessed to certain tracts in the assessment list, the mark appearing before other sums standing in the same relation in the same column, does not vitiate the assessment, the presumption being that all the sums were intended to express sums of money.[8] With reference to the designation of the owner of the land assessed it was formerly held that an assessment to a party named and to unknown owners was void,[9] and that an assessment against a party as owner creates no liability against him, unless he was in fact the owner.[10] But it is now provided that no mistake or error in the names of the owner or supposed owner or mistake in any other particular shall render the assessment invalid.[11]

Amendment.—Section 3460 of the Political Code, as amended in 1917, provides that "If there be any error or mistake in the description of the land, or in the name of the owner, or if any land which should be assessed has been or shall be omitted from the list, or if there is any error or mistake in any other respect, the commissioners may amend or correct the same at any time before the lists shall have been approved by the board of supervisors."[12]

6. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763.

7. Swamp Land Reclamation Dist. v. Wilcox, 75 Cal. 443, 17 Pac. 241.

8. Swamp Land Reclamation Dist. v. Wilcox, 75 Cal. 443, 17 Pac. 241.

9. Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103.

10. Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103.

11. Pol. Code, § 3461, as amended in 1905 and 1911.

12. See Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763, as to power of amendment under section 3460 of the Political Code as it stood in 1914.

§ 41. Description of Land.—An attempted description of land in an assessment list should be liberally construed, and upheld if it is sufficient to apprise the land owner of the tract sought to be assessed, especially in view of the large powers of amendment lodged in the assessment commissioners by section 3460 of the Political Code.[13] Indeed, any description which clearly identified and marked out the land is good,[14] including a description by reference to the lands of adjacent owners.[15] It is not requisite that a description by legal subdivision should be of the smallest subdivisions known to the congressional system of surveys, that is, forty acres.[16] If the description is sufficient to apprise an owner of the land intended, it is not a fatal objection that certain boundaries are only partially set forth,[17] or that the description contains an obvious clerical error,[18] or that the abbreviations used are not those usually employed.[19]

§ 42. Equalization.—Since 1911 section 3462 of the Political Code has provided for hearings before the board of supervisors, after the assessment lists have been filed with it, at which written objections thereto may be considered and the assessment may be modified, amended or entirely reapportioned. The order of the board of supervisors finally approving the assessment is made conclusive evidence of its correctness, except in an action instituted by the taxpayer pursuant to the section. The determination of the board of supervisors that an assessment is valid is decisive on the question of defects in the proceed-

13. See infra, § 40.

14. Swamp Land Reclamation Dist. v. Wilcox, 75 Cal. 443, 17 Pac. 241.

15. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763.

16. Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887.

17. Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763.

18. Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887.

19. Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335.

ings for the levy, as well as to the apportionment of the assessment with regard to benefits. And even the absence of any petition or statement from the trustees as a basis for the assessment, it seems, might be thus cured. But the determination of the supervisors cannot conclude the property owner in reference to matters affecting their jurisdiction, as where the assessment is levied for a purpose not authorized by law. Nor does the statute make the decision of the supervisors final in the sense that it is beyond the reach of the general equity powers of the courts to relieve against judgments rendered without jurisdiction or through fraud or mistake.[20] Under special drainage legislation, also authorizing the equalization of assessments, it has been held that an official board sitting as a board of equalization to correct errors and inequalities in a drainage assessment, acts judicially; but it does not constitute a court, nor disclose an instance of the improper commingling of executive and judicial functions, as prohibited by sections 1 and 5 of article VI of the constitution. The hearing accorded by such a board on notice to property owners, satisfies the constitutional requirement of due process of law. Members of an official board are not disqualified by interest to hear, as a board of equalization, objections to a drainage or reclamation assessment, merely because they are land owners within the district.[1]

§ 43. Reassessments.—Section 3466½ of the Political Code was enacted in 1899, and amended in 1911 and 1915. As last amended it provides in substance that if an assess-

20. Finnan v. Reclamation Dist. No. 273, 26 Cal. App. 714, 148 Pac. 227, 152 Pac. 1197. See Payne v. Ward, 23 Cal. App. 492, 138 Pac. 967, decided under the act of March 18, 1885 (Stats. 1885, p. 204, amended Stats. 1909, p. 25), providing that assessment lists shall be prima facie evidence after their approval by the board of equalization, and holding that the lists are not thereby rendered conclusive of the validity of the assessment, that being a matter resting with the courts. See infra, § 50, as to hearing before board of equalization being due process of law.

1. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207.

ment shall be adjudged invalid in whole or as to any lands within the district, or if, for any reason, any lands shall be omitted, a new assessment may be made on the lands of the district to raise the amount of the invalid assessment and any further sum then found necessary, in which the relieved or omitted lands shall be then charged with such proportion of the former assessment as the benefits derived from the reclamation it supported warrant; or a subsequent assessment of the lands particularly involved may be made, to charge them with their proper proportion of the costs of reclamation. It also provides for credits to be allowed to anyone who has paid any part of the invalid assessment. The act as enacted in 1899 provided for credits also, but this provision was repealed in 1911 and later restored in 1915.[2]

§ 44. Nature and Procedure.—The reassessment provided for by section 3466½ of the Political Code is not limited to cases where the work of reclamation has been completed, but may be levied for work yet to be done, its scope being commensurate with the additional assessments provided for by section 3459.[3] Although made in connection with a subsequent assessment for new work and outstanding debts, the reassessment is not a part of it, and cannot be considered in determining the equitable character of the latter.[4] An adjudication that an assessment is invalid is not controlling as to the validity of a reassessment where the objections to the previous assess-

2. Meyer v. Reclamation Dist. No. 77, 172 Cal. 104, 155 Pac. 635. See Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840 (for a résumé of the legislative history). See also Finnan v. Reclamation Dist. No. 273, 26 Cal. App. 714, 148 Pac. 227, 152 Pac. 1197, holding that inasmuch as the amendment of 1911 did not provide for any credits a subsequent assessment which included an interest charge due on account of payment of the invalid assessment, was for a purpose unauthorized by law, and void. See infra, § 49.

3. Silva v. Reclamation Dist. No. 1001, 41 Cal. App. 326, 182 Pac. 786.

4. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840.

ment were obviated in the reassessment.[5] When a reassessment is made by the same commissioners who made the original assessment, it is sufficient if they view only the lands to be reassessed.[6] It is immaterial, in apportioning the reassessment, that most owners paid the previous assessment without contest.[7]

§ 45. Amount and Effect.—The clause in the section 3466½ of the Political Code requiring delinquent lands to be charged in the subsequent assessment "with such proportion of the former assessment as the benefits derived by said land from the reclamation for which said former assessment was levied bears to the whole amount of said former assessment," and the clause authorizing land to be charged "with its proper proportion of the costs of reclamation," refer to the same thing and have the same meaning. The word "benefits" in the former is not to be taken as the actual total benefits, as they may greatly exceed the cost of the work. Such benefits are never estimated, except for the purpose of determining that they will equal or exceed the cost. That fact being ascertained, the benefits are then deemed equivalent to the total cost, and the "benefit" to each parcel is the equivalent of its just share of the total cost.[8] Land owners who have paid an assessment afterwards adjudged invalid cannot complain, in a subsequent assessment for new work and outstanding debts, which also included as against owners delinquent with respect to the invalid

5. Roth v. Reclamation Dist. No. 1001, 183 Cal. 447, 191 Pac. 890; Silva v. Reclamation Dist. No. 1001, 41 Cal. App. 326, 182 Pac. 786. See JUDGMENTS, as to doctrine of res adjudicata in general.

6. Silva v. Reclamation Dist. No. 1001, 41 Cal. App. 326, 182 Pac. 786.

7. Roth v. Reclamation Dist. No. 1001, 29 Cal. App. Dec. 732.

8. Concurring opinion of Mr. Justice Shaw in Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840. See Roth v. Reclamation Dist. No. 1001, 29 Cal. App. Dec. 732, construing the latter clause. As to opinion of supreme court in this case, see 183 Cal. 447, 191 Pac. 890.

assessment their proportion thereof, that they were not, in the latter respect, subject to an interest charge, as the error, if any, concerns them and not complainants.[9] Where an assessment is adjudged invalid as to a particular tract of land only, the validity of the assessment in other respects is not affected, and an assessment to reimburse owners as to whom the original assessment was valid is unauthorized.[10]

Lien, Payment, Validation and Enforcement.

§ 46. In General—Lien.—Under the reclamation system of California the collection of an assessment for works of problematical value may be enforced in advance of the doing of the work itself, and if the work should prove a failure the property owner is remediless.[11] But the willful and inexcusable refusal of a reclamation district to do the work for which an assessment to defray annual operations was levied relieves the land owners from the obligation to pay it, if the value of the work is such that it could not afterwards be done, to their benefit.[12] The adjudication that the assessment of a particular tract in a reclamation district is void does not furnish a legal excuse to other land owners for not paying their proportionate part.[13]

Lien of assessment.—Where the board of supervisors has finally taken action modifying or approving an assessment, the charges thereby assessed upon the various tracts "shall constitute a lien thereon and shall impart notice thereof to all persons." Likewise where the board of trustees levies the assessment as provided by section 3456 (b) of the Political Code, "the charges so assessed

9. Per Lawlor, J., in Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840.

10. Reclamation Dist. No. 17 v. Bonbini, 158 Cal. 197, 110 Pac. 577.

11. Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170.

12. See infra, § 57.

13. Reclamation Dist. v. Bonbini, 158 Cal. 197, 110 Pac. 577.

upon any said tract shall constitute a lien thereon and shall impart notice thereof to all persons."[14] The lien arising pursuant to these provisions, like that of any other tax levied under the sovereign authority of the state, is paramount to the lien of a mortgage.[15] And the liability for the assessment persists against the property until some suitable legislation is enacted which will enable the governmental agency to enforce it.[16]

Interest.—Delinquent assessments may be made to bear interest.[17] At the present time assessments bear interest at the rate of seven per cent per annum, from the date the county treasurer returns the assessment lists to the board of trustees.[18]

§ 47. Payment.—After the assessment lists have been approved by the board of supervisors,[19] they are to be filed with the county treasurer.[20] The lists must remain in his office for thirty days, during which time payment of the assessment may be made.[1] At the expiration of that time the lists are returned to the board of trustees. And thereafter all payments are required to be made in separate installments of such amounts and at such times, respectively, as the board, from time to time, in its discretion, by order entered in its minutes, may direct. Notice of the calling of an installment is to be entered on the minutes and served on the land owners in the manner

14. Pol. Code, § 3463, as amended by Stats. 1917, p. 1206, and Stats. 1919, p. 610; Swamp Land etc. Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389. See Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763, as to effect of amendment of assessment list on lien, under the former statute allowing such amendment before or after filing of the list.

15. Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 354. See TAXATION.

16. Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338.

17. Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. 945; People v. Hagar, 52 Cal. 171.

18. Pol. Code, § 3466, as amended by Stats. 1917, p. 1206. See infra, § 47.

19. See supra, §§ 40, 41, 43.

20. Pol. Code, § 3462.

1. Pol. Code, § 3465.

prescribed.[2] Delinquency does not occur until sixty days after the date of the order made by the trustees calling for the payment of an installment,[3] at which time the whole of the assessment becomes delinquent if the installment has not been paid.[4] The provision for the payment of assessments in installments is mandatory, the discretion of the trustees going no further than to fix the amounts of installments and their time of payment, and the board has no power, against the will of the land owner, to call in the whole of an assessment at once.[5] It has been held, however, that a board may covenant to pay for certain work in cash on a given date. In that event it may be compelled by mandamus to observe its contractual obligation.[6]

§ 48. **Medium of Payment.**—During the thirty days the assessment lists remain in the office of the county treasurer, assessments are payable "in gold coin of the United States, or in warrants of the district drawn by order of the trustees thereof, and approved by the board of supervisors of the county."[7] Assessments may be made payable in gold coin[8] without infringing on the federal statutes making notes of the United States legal tender in payment of debts,[9] and without impairing the obligation

2. Pol. Code, § 3466, as amended by Stats. 1917, p. 1206. See supra, § 22, as to duty of trustees with respect to the collection of assessments.

3. See infra, § 58.

4. Pol. Code, § 3466, as amended in 1917. See Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389, holding that in 1909 the assessments became delinquent, if not paid within thirty days after the assessment lists were filed with the county treasurer.

5. Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598.

6. Moreing v. Shields, 28 Cal. App. 513, 152 Pac. 964.

7. Pol. Code, § 3465.

8. Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. 945; People v. Hagar, 52 Cal. 171; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes; Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366, 6 Sawy. 567.

9. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes.

of any contract.[10] The district must accept payment as commanded by the legislature, and may by mandamus be compelled to do so. Thus the legislature may make an assessment payable in warrants of the district, and if it does so, the fact that a warrant so tendered had been registered in the treasurer's office subsequently to other warrants, is immaterial.[11] However, the tender of a warrant which is larger in amount than the assessments due, and which is tendered merely for the purpose of having the assessments indorsed on it, but which is not delivered up or canceled, is not a satisfaction of the assessments under section 3465.[12]

§ 49. Credit for Payment of Previous Invalid Assessment.—The code provides that in case an assessment is adjudged invalid, any land owner who shall have paid it is entitled to a credit therefor on any subsequent assessment levied upon the tract of land on which the invalid assessment was paid. This right originally granted in 1899 was withdrawn in 1911 and afterwards restored in 1915.[13] A withdrawal of the right does not affect or de-

10. Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366, 6 Sawy. 567.

11. Hershey v. Reclamation Dist., 162 Cal. 401, 122 Pac. 1074, holding also that under section 3457 as it stood from 1909 to 1917, authorizing payment by warrant "at any time," the assessment could be so paid notwithstanding section 3465 made such a mode of payment available only during the thirty days the assessment lists remain in the county treasurer's office, and section 3466, as it then stood, required that a decree for the sale of the property offered should direct the sale to be made for gold and silver coin. Prior to 1909, assessments could not be paid by warrant at the trial of an action for its collection. Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. 462. See MANDAMUS.

12. Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. 462.

13. Pol. Code, § 3466½. See Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338 (holding that land owners who had paid an illegal assessment prior to April 5, 1911, were, nevertheless, not entitled to such a credit on a subsequent assessment which equalized the burden of the property owners under the invalid assessment by levying an amount in proportion to the charge made by it, on the lands of those who had not paid it, as authorized by the amended section, as this equalization was in effect an allowance of a credit to those property owners who had paid it).

stroy any vested right of a property owner who had previously paid an invalid assessment, nor impair the obligation of contracts as the relation between the taxpayer and the state is not a contractual one. Or in any event the right does not become vested until the entry of a judgment declaring the assessment invalid, so that a withdrawal prior thereto cannot impair a vested right.[14] As indicated by the language of the code, the credit is allowed only to land owners as to whom the assessment is adjudged invalid.[15] Though, under the statute, the amount of the invalid assessment paid is to be credited on any subsequent assessment "on the tract of land on which" the first assessment was levied, the grantee of an owner who had paid such an assessment is not entitled to such a credit, in the absence of a showing that the amount of the payment entered into the purchase price of the land.[16] The claims for a credit under this code provision cannot be adjudicated in an action brought under section 3462 to contest the validity of a subsequent assessment. The remedy in such a case would be to demand repayment from the county treasurer of the money paid under the invalid assessment, or a credit on the subsequent assessment, failing which a new action should be instituted.[17]

§ 50. Right of Land Owner to Hearing.—"Due process of law" requires that a land owner shall at some time or another be given an opportunity to contest the validity of an assessment against his property.[18] By the legisla-

14. Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338.

15. Reclamation Dist. v. Bonbini, 158 Cal. 197, 110 Pac. 577.

16. Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338.

17. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840.

18. McPhee v. Reclamation Dist., 116 Cal. 566, 119 Pac. 1077; Reclamation Dist. v. Bonbini, 158 Cal. 197, 110 Pac. 577; Swamp Land etc. Dist. No. 341 v. Blumenberg, 156 Cal. 539, 106 Pac. 392; Swamp Land etc. Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389; Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131; Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; Finnan v. Reclamation Dist. No. 273, 26 Cal. App.

tive custom of the country two methods are provided for the collection of the various taxes assessed for governmental expenses. In one of them the property is sold by administrative officers without judicial proceedings; in the other, a decree of court must be secured, foreclosing the lien of the assessment and directing a sale of the premises. Each constitutes "due process of law," provided the land owner has an opportunity to be heard.[19] The suit to collect an assessment, which until 1915 was the only method of enforcing it, known to the law of California, and in which notice was necessarily given the land owner and opportunity to set forth all his grievances, constituted due process of law,[20] even though he had no previous chance to contest the assessment,[1] and even though the court had no power to change the assessment.[2] In such a case the property was taken only in pursuance of the judgment after full hearing,[3] the suit for collection or validation being merely a step in the creation of a valid and binding assessment.[4] So jealously do the courts protect the right of the land owner to be heard that it has been held

714, 148 Pac. 227, 152 Pac. 1197. See CONSTITUTIONAL LAW, vol. 5, pp. 861–885, as to due process of law in general.

19. Payne v. Ward, 23 Cal. App. 492, 138 Pac. 967; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes.

20. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes. See Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335, overruling People v. Hagar, 52 Cal. 171, and holding that an attack made in such a suit on the legality of previous proceedings is not a collateral one. To hold that the assessment-roll was conclusive on the question of benefits and not subject to such an attack, would be a denial of due process of law.

1. Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. 945; Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676; Reclamation Dist. No. 108 v. Evans, 61 Cal. 104; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes; Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366, 6 Sawy. 567.

2. Reclamation Dist. No. 108 v. Evans, 61 Cal. 104.

3. Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366, 6 Sawy. 567.

4. Hershey v. Reclamation Dist., 162 Cal. 401, 122 Pac. 1074; Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335.

that if the only proceeding open to the land owner in which the existence of the district could be litigated, were quo warranto, then he would be entitled to the interposition of a court of equity to enjoin proceedings against his land by the district, either before or after judgment in such proceedings, until the remedy by quo warranto could be fully availed of.[5]

A hearing before a board of equalization, such as is now provided by the Political Code, in lieu of a suit, followed by an administrative tax sale of delinquent property,[6] is also due process of law. "The law in prescribing the time when such complaint will be heard gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[7]

§ 51. Validation of Assessment in General.—Section 3466 of the Political Code, as amended in 1917, provides that assessments heretofore made "shall be validated and collected in the manner provided by law at the time" they were made. The term "validated," as used herein, means to irrevocably fix upon the land a lien for the amount of the assessment,—not upon parcels into which the land may thereafter be subdivided, but upon the land as an entirety, as returned in the assessment lists.[8] In 1893, section 3493½ was added to the Political Code,[9] by which the trustees of a reclamation district were authorized to institute a suit to determine the validity of an assessment. Prior to this, the property owner's sole opportunity to contest the assessment had been in an action to collect it. Both of these methods of procedure proving cumbersome,

5. McPhee v. Reclamation Dist., 161 Cal. 566, 119 Pac. 1077.

6. Pol. Code, §§ 3462, 3466. See supra, § 49.

7. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, see, also, Rose's U. S. Notes.

8. Scale v. Balsdon, 34 Cal. App. Dec. 738, 197 Pac. 971.

9. Stats. 1893, p. 208.

the legislature in 1911 repealed section 3493½,[10] and by amending section 3462 provided for an equalization of the assessment by the county supervisors, upon notice and hearing,[11] and that after the board's approval of the assessment list it should be conclusive evidence that the assessment had been made and levied according to law, except in an action begun within thirty days after the list had been filed with the county treasurer, by any person aggrieved, in the superior court of the county where the bulk of the district is situated, to have the assessment corrected, modified or annulled. No objection to the assessment can be considered by the supervisors "or allowed in any other action or proceeding," unless it has been made in writing to the board. If this action is not brought the legality of the assessment cannot afterwards be attacked.[12] By further amendment in 1917, however,[13] the provisions of section 3462 were made inapplicable to assessments for maintenance, repairs and incidental expenses levied under section 3456 (b), but that section contains similar provisions regarding such assessments, and authorizes a similar action.[14] At the present time, therefore, the burden of attacking the assessment in the courts is placed upon the property owner, and the right restricted by narrow limitations. The abolition of the suit to enforce assessments, and the substitution of an administrative sale of the property covered by its lien,[15] leaves the action provided for by sections 3462 and 3456 (b) the land owner's sole opportunity for judicial redress.

§ 52. Action by Trustees.—Former section 3493½ of the Political Code just referred to[16] was a constitutionally valid

10. Stats. 1911, p. 656.
11. See supra, § 42.
12. Stats. 1911, p. 644.
13. Stats. 1917, p. 1204.
14. Pol. Code, § 3456 (b), as amended by Stats. 1917, p. 1198, and Stats. 1919, p. 607.
15. See infra, § 58. See 9 A. L. R. 842, as to loss of right to contest assessment by waiver or estoppel.
16. See supra, § 51.

enactment,[17] for the purpose of determining the validity of the assessment, its beneficial character and proper levy, in advance of the suit to foreclose the assessment lien.[18] The action contemplated by the section was one quasi in rem.[19] It declared a status,[20] and was binding on the lands assessed and, therefore, on subsequent purchasers, even though no lis pendens was filed.[1] Hence, too, the consular privilege of a land owner was not a bar to its maintenance.[2] The fact that the summons issued in an action brought under the section did not require the defendant to answer within ten days if served within the state, as the section prescribed, but required answer within ten days if served within the county, as it in fact was, and within thirty days if served elsewhere, did not affect the jurisdiction of the court over the person of the defendant, or invalidate the judgment.[3] In this action, the land owner had the right to urge any defense going to the validity of the assessment,[4] including the defense that the assessment was not made in proportion to benefits, or that there had been a material overrating of benefits and consequent injury to the taxpayers.[5]

17. Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887.

18. Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 539, 106 Pac. 392.

19. Hershey v. Reclamation Dist., 162 Cal. 401, 122 Pac. 1074; Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131; Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598.

20. Hershey v. Reclamation Dist., 162 Cal. 401, 122 Pac. 1074.

1. Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598.

2. Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131. See DIPLOMATIC AND CONSULAR OFFICERS, ante, p. 489.

3. Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598.

4. Reclamation Dist. v. Bonbini, 158 Cal. 197, 110 Pac. 577; Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131; Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070.

5. Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131; Riverdale etc. Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070.

The judgment rendered in the action was conclusive upon the validity of the assessment,[6] and merged any lesser right, such as the right to have the assessment paid in a particular medium.[7] On a collateral attack every presumption would be indulged in favor of the judgment, including the presumption that in the validation suit there was evidence that a sale of the property of a trustee to the district was free from fraud.[8]

§ 53. Action by Land Owner.—The action to contest the validity of an assessment, authorized by section 3462 of the Political Code,[9] can be maintained only by some person who is aggrieved by the action of the board of supervisors in approving it.[10] In such an action no objections to the assessment are available, under the express provisions of the section, except such as have already been presented in writing to the board of supervisors, unless they go to the jurisdiction and render the proceedings wholly void.[11] Allegations in a complaint under section 3462, that the lands of plaintiff were not charged with their just proportion of a former invalid assessment, nor with the proper proportion of the costs of reclamation, are mere legal conclusions which have no proper place in a pleading.[12]

6. Swamp Land etc. Dist. No. 341 v. Blumenberg, 156 Cal. 539, 106 Pac. 392 (holding the judgment was conclusive, not only as to defense presented, but as to any objection that might have been urged, such as the willful refusal of the district to do the work for which the assessment was levied); Swamp Land etc. Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389; Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598; Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598. See supra, § 44, as to effect of judgment upon a reassessment.

7. Hershey v. Reclamation Dist., 162 Cal. 401, 122 Pac. 1074.

8. Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598.

9. See supra, § 51.

10. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635. See 9 A. L. R. 842, as to loss or waiver of right to contest assessment.

11. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635; Finnan v. Reclamation Dist. No. 273, 26 Cal. App. 714, 148 Pac. 227, 152 Pac. 1197.

12. Spurrier v. Reclamation Dist. No. 17, 172 Cal. 157, 155 Pac. 840.

And allegations that the supervisors did not take evidence prior to appointing assessment commissioners, that plaintiff did not know of such proceedings, that the board made no formal finding in regard to objections made before it to the assessment, and also as to the nature and effect of the evidence then produced before the board, the reasons which actuated the board in making the assessment, and the claims and arguments of plaintiff at that hearing, are properly stricken out as immaterial.[13] Where in an action to annul an assessment under this section the court finds that plaintiff's lands will not be benefited by the proposed work, the determination of this issue is conclusive between the parties in a suit to annul a reassessment based on more elaborate plans but contemplating the same work.[14] The remedies afforded the land owner against an invalid assessment by section 3462 would seem to be sufficiently plain, speedy and adequate, to preclude a resort to certiorari.[15]

Recovery of assessments paid.—In the absence of some element of duress or coercion, the payment of a reclamation assessment is to be deemed voluntary, and, unless otherwise provided by statute, cannot be recovered, even though made under protest.[16] Section 3819 of the Political Code, providing that a payment of taxes under protest shall not be deemed voluntary, applies only to state and county taxes.[17]

13. Meyer v. Reclamation Dist. No. 17, 172 Cal. 104, 155 Pac. 635.

14. Roth v. Reclamation Dist. No. 1001, 183 Cal. 447, 191 Pac. 890. But holding that a finding that one hundred and sixteen acres of plaintiff's land will not be benefited is not conclusive as to benefits to various tracts aggregating one hundred and eighty-one acres, since the surplus acreage may admit of a finding of benefit to a portion of each tract.

15. Finnan v. Board of Supervisors, 26 Cal. App. 724, 148 Pac. 231. See CERTIORARI, vol. 4, p. 1051.

16. Justice v. Robinson, 142 Cal. 199, 75 Pac. 776; Spurrier v. Neumiller, 37 Cal. App. 683, 174 Pac. 338. See PAYMENT.

17. Justice v. Robinson, 142 Cal. 199, 75 Pac. 776.

§ 54. Injunctive Relief to Land Owner.—It seems that if an assessment is void, a land owner may not only proceed under section 3462 of the Political Code just referred to, but that he may also obtain an injunction against proceedings to collect it. It has been held that an injunction suit to restrain the collection of an assessment levied under the act of March 18, 1885,[18] may be maintained by the land owner, though not expressly authorized by that act, section 14 seeming to recognize such a remedy, and the action being also sustainable on familiar equitable principles.[19] An injunction will not, however, be granted to restrain enforcement of the assessment while the question of the de jure existence of the district is being litigated in quo warranto, since a de facto existence, merely, is sufficient to support the assessment. And under subdivision 1 of section 3423 of the Civil Code, forbidding the enjoining of a pending action except to prevent multiplicity of suits, a suit to foreclose the lien of an assessment, when that remedy was in vogue, could not be enjoined after it had been in fact instituted.[20] While the wrongful omission of lands from an assessment might constitute good ground for enjoining the collection of the assessment, such omission is no ground for enjoining the work of reclamation as there might be a sufficient fund already collected for that work.[1] And a property owner cannot complain of an irregularity in apportioning an assessment which does not have any effect upon the amount of the assessment against his property.[2]

18. Stats. 1885, p. 204, amended Stats. 1891, p. 262, and Stats. 1909, p. 25. See Gen. Laws, Act No. 985.

19. Payne v. Ward, 23 Cal. App. 492, 138 Pac. 967. It seems that in such an action, a decree foreclosing the lien of the assessment might be rendered upon proper pleadings.

20. McPhee v. Reclamation Dist., 161 Cal. 566, 119 Pac. 1077.

1. Hoke v. Perdue, 62 Cal. 545; Hoke v. Perdue, 2 Cal. Unrep. 116.

2. Payne v. Ward, 28 Cal. App. 553, 153 Pac. 462.

§ 55. Enforcement by Action.—Prior to the amendment, in 1915, of section 3466 of the Political Code,[3] the only means by which a reclamation district could enforce an assessment against a land owner was through the action formerly authorized by that section. Under this state of the law a cause of action accrued for any unpaid installment twenty days after the board's order calling it.[4] But when a land owner defaulted in the payment of an installment, an action might be brought either for the installment or the whole amount of the assessment as the trustees should elect.[5] The provision authorizing suit for the entire assessment in such case was construed, however, as a forfeiture for the benefit of the district which could be, and was, waived by subsequently accepting payment of the delinquent installment. In that event no cause of action for the entire assessment accrued, and no statute of limitations was set in motion concerning it.[6] Since an assessment is a unit, constituting but one transaction, though several tracts belonging to one owner are separately assessed, all such assessments might have been recovered in a single action.[7] So also two delinquent assessments, made at different times, might be recovered in the same action.[8] In such action only a sale of the property assessed could be had.[9]

3. See infra, § 58.

4. See People v. Hulbert, 71 Cal. 72, 12 Pac. 43, holding the three year statute of limitations prescribed by subdivision 1 of section 338 of the Code of Civil Procedure applied to the action. And see Swamp Land Dist. v. Glide, 112 Cal. 85, 44 Pac. 451, as to effect of amendment of the statute of 1891 upon causes of action already barred. See LIMITATION OF ACTIONS.

5. Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389. See Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598, holding action could not be brought for the whole of the assessment until the property owner had defaulted in the payment of an installment.

6. Reclamation Dist. No. 536 v. Hall, 131 Cal. 662, 63 Pac. 1000.

7. People v. Hagar, 52 Cal. 171.

8. Swamp and Overflowed Land Dist. No. 110 v. Feck, 60 Cal. 403.

9. Atchison etc. Ry. Co. v. Reclamation Dist. No. 404, 173 Cal. 91, 159 Pac. 430. (The fact that the land assessed was part of the right of way of a railroad company and therefore not subject to a

Evidence.—In an action for assessment, it was not competent to ask a witness whether in his opinion an assessment is proportionate to benefits.[10] Under section 1918 of the Code of Civil Procedure the following documents may be proved by certified copies: A petition for the formation of a reclamation district which is a record of the board of supervisors, the by-laws and appointment of trustees recorded in the recorder's office, and an official letter from the register of the state land office, numbering the district, and which is also property in the recorder's custody.[11]

§ 56. Parties—*Plaintiff.*—Under the Green Act,[12] providing that the district attorney should proceed against delinquents in the manner "provided by law for the collection of state and county taxes," an action to collect an assessment was properly brought in the name of the people, that being the method provided for the collection of taxes on real estate.[13] But the formal error in bringing such an action in the name of the reclamation district did not justify the reversal of a judgment, the error, if any, being immaterial.[14] And, indeed, the action might well have been brought in the name of the district, as the real party in interest.[15] Under section 3466 of the Political Code, as it stood in 1880, authorizing the district attorney to collect by suit delinquent assessments, but omitting the requirement of the Green Act just referred to, the action must,

forced sale of this character, did not give the reclamation district the right to pursue an action for a personal judgment against the company. The remedy in such a case is for the legislature to supply); People v. Hulbert, 71 Cal. 72, 12 Pac. 43.

10. Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156. See EVIDENCE, as to opinion evidence generally.

11. People v. Hagar, 52 Cal. 171. See EVIDENCE; RECORDS.

12. Stats. 1867–68, p. 507, § 35.

13. People v. Hagar, 52 Cal. 171. See People v. Hagar, 52 Cal. 190, as to compensation of district attorney.

14. Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. 945.

15. Reclamation Dist. No. 3 v. Parvin, 67 Cal. 501, 8 Pac. 43.

under section 367 of the Code of Civil Procedure, have been prosecuted in the name of the real party in interest, which was the reclamation district, and could not be brought in the name of the people.[16]

Defendants.—Under the former provision of section 3466 authorizing the trustees to commence the action to collect an assessment "against the persons to whom the same is assessed, and, if assessed to unknown owners, then against the real owners," the assessment could not be thus enforced against the real owners of a tract of land unless they were the persons named in the assessment, or the assessment had been made against unknown owners, where the assessment was against a named person, he alone could be sued.[17] Where community property was assessed in the name of the wife, in whose name the title stood, a sale of the property under a decree foreclosing the lien of the assessment did not affect the husband's interest.[18] Under the former provision of section 3466, providing that any person claiming an interest in land in a reclamation district might appear and answer within forty days after posting and publication of summons, all such persons who might appear were in effect made defendants in the action.[19]

§ 57. **Defenses.**—Where a land owner had had no previous opportunity to contest the validity of an assessment, either before the county supervisors as provided by the amendment in 1911 to section 3462 of the Political Code,[20] or in the validating suit brought by the trustees under former section 3493½,[1] any defense going to the legality of the assessment was open to him in the suit to foreclose

16. People v. Haggin, 57 Cal. 579.

17. Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254.

18. Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103.

19. Reclamation Dist. v. Coghill, 56 Cal. 607, and holding such parties may move to set aside a default judgment.

20. See supra, §§ 42, 53.

1. See supra, § 52. See supra, § 50, as to due process of law.

its lien.[2] These possible defenses included all questions as to the regularity of the assessment proceedings,[3] as to the fact and amount of benefits,[4] the apportionment of the costs in accordance with the benefit to the tract assessed,[5] and the existence of the district, either de jure or de facto.[6] The willful refusal of the district to do the work for which the assessment was levied might also be set up.[7] But it could not be urged as a defense that the property owner had constructed certain reclamation work which was being used by the district and for which he had never been compensated, but it might be that this would constitute a proper matter of setoff. So also an agreement between certain property owners in a district, to which it was not a party, that they would construct certain reclamation works and then commence proceedings to have their lands set off as an independent district, afforded them no defense to liability for an assessment.[8]

§ 58. Enforcement by Sale of Property.—The amendment of 1911 to section 3462 of the Political Code having provided for a hearing for the property owner before the board of county supervisors, sitting as a board of equaliza-

2. Reclamation Dist. v. Bonbini, 158 Cal. 197, 110 Pac. 577; Swamp Land etc. Dist. No. 341 v. Blumenberg, 156 Cal. 539, 106 Pac. 392; Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389; Finnan v. Reclamation Dist. No. 273, 26 Cal. App. 714, 148 Pac. 227, 152 Pac. 1197 (determining also the question when an assessment was "already commenced" within the meaning of the saving clause in the amended section).

3. Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389.

4. Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 539, 106 Pac. 392; Lower Kings River Reclamation Dist. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335. Contra, People v. Hagar, 66 Cal. 59, 4 Pac. 951.

5. Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 539, 106 Pac. 392; Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389.

6. McPhee v. Reclamation Dist., 161 Cal. 566, 119 Pac. 1077.

7. Swamp Land etc. Dist. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389.

8. Reclamation Dist. v. Snowball, 160 Cal. 695, 117 Pac. 905, 118 Pac. 514.

tion, and thus giving him due process of law,[9] the way was paved for the abolition, in 1915, of the action to collect the assessment, and its enforcement by an administration sale by the trustees, in the manner of a tax sale. This was done by an amendment to section 3466 of the Political Code.[10] Further amendments were made in 1917[11] and in 1921.[12] By the present scheme, the whole of an assessment becomes delinquent when any installment remains unpaid sixty days from the date of the trustees' order calling for the installment, and a penalty of ten per cent of the installment and interest is thereupon added. The trustees must immediately publish a notice of delinquency and sale, once a week for two weeks. The date of sale shall not be less than ten days from the last publication. The sale is had in front of the county court house, and must be to the highest bidder, and for gold coin. The owner may designate the portion of the land he desires first sold the trustees may offer the least portion that will bring the amount due. The trustees are to pay the amount due to the county treasurer out of the proceeds of the sale, and the surplus to the owner. The trustees may postpone the sale within certain limits. If no one bids the amount due, the district becomes the purchaser. A certificate of sale is executed by the trustees, which is prima facie evidence of the regularity of the proceedings. One year is allowed for redemption, after which a deed follows. Assessments made before the inauguration of this scheme, are to be collected in the old fashion. The method of enforcing the assessment by sale has been of too recent origin to give opportunity for much judicial construction. It has been held, however, that a certificate of sale given by the trustees to a purchaser, which sets out the notice of sale giving the description of the land as the southeast quarter

9. See supra, §§ 42, 50.
10. Stats. 1915, p. 1525.
11. Stats. 1917, p. 1206.
12. Stats. 1921, p. 555.

of section 27, but which declares a sale of the southeast quarter of section 21, is void for uncertainty.[13]

IV. BONDS AND WARRANTS.

§ 59. Warrants. — The Political Code authorizes the drawing of warrants upon reclamation districts for expenses incident to the reclamation, and makes provision for their approval in certain cases by the board of supervisors[14] and for their registration and payment.[15] The approval of warrants by the board of supervisors is a matter of discretion which cannot be controlled by mandamus. Where a reclamation district is situated in more than one county, and its funds are accordingly paid by the assessed owners of the lands located in each county into the treasury of that county as required by section 3458 of the Political Code, warrants drawn by the trustees on the funds must be approved by the board of supervisors of the county of deposit, and not by the board of the county in which the major portion of the lands are situated, such being the construction to be given section 3456, in view of the general scheme for the management and control of the work and funds as outlined in the code.[16] A warrant drawn for an indebtedness which the trustees have power to incur cannot be collaterally challenged.[17] And where warrants for reclamation work have been issued and approved by the board of supervisors, as required by section

13. Lewis v. Tulare Reclamation Dist. No. 749, 37 Cal. App. Dec. 77, 204 Pac. 421. See supra, § 55, as to remedy where land assessed is not subject to forced sale.

14. Pol. Code, § 3454, as amended by Stats. 1917, p. 1193; § 3455, as amended by Stats. 1917, p. 1197, and Stats. 1917, p. 604; § 3457, as amended by Stats. 1917, p. 1202, and Stats. 1921, p. 343; § 3465, as amended by Stats. 1917, p. 1206; § 3467, new section added by Stats. 1921, p. 1590.

15. See infra, § 60.

16. Cosner v. Colusa County Supervisors, 68 Cal. 274.

17. Reclamation Dist. No. 785 v. Lovdal Bros. Co., 42 Cal. App. 271, 183 Pac. 598.

3456, the finding of the trustees that the work was properly done cannot be collaterally attacked.[18]

§ 60. Registration and Payment.—Under section 3457 of the Political Code, providing that warrants of a reclamation district "must be presented to the treasurer of the county, and if they are not paid on presentation, such indorsement must be made thereon, and they must be registered," etc., presentation is equivalent to a demand for payment.[19] Warrants registered in accordance with this provision bear interest at the rate of seven per cent per annum,[20] and must be paid strictly in the order of registration, except those by their terms payable at a future date, which are deemed registered at maturity.[1] Priority is not to be accorded a warrant merely because judgment has been rendered on it, or execution issued. A county treasurer is justified in refusing to pay a warrant where there are not sufficient funds on hand to do so and still meet warrants previously registered, even though the holders of the latter warrants have made no further demand for payment beyond the original presentation and registration under section 3457.[2] But where a warrant of the district is tendered in payment of an assessment, as authorized by section 3465 of the Political Code, the fact that it has been registered in the treasurer's office subse-

18. Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. 1091.

19. Pacific Gas & Electric Co. v. Cole, 32 Cal. App. 266, 162 Pac. 435.

20. Pol. Code, § 3457. See National Bank of D. O. Mills & Co. v. Greenlaw, 134 Cal. 673, 66 Pac. 963, construing section 3457 of the Political Code as it stood in 1901, when no rate was specified, and holding that the rate was governed by section 1917 of the Civil Code, fixing the rate of interest for moneys due on instruments of writing, and by section 71 of the County Government Act. Stats. 1897, p. 477.

1. Pol. Code, § 3457, as amended by Stats. 1917, p. 1202, and Stats. 1921, p. 343; Pacific Gas & Electric Co. v. Cole, 32 Cal. App. 266, 162 Pac. 435.

2. Pacific Gas & Electric Co. v. Cole, 32 Cal. App. 266, 162 Pac. 435.

quently to other warrants is immaterial as regards the obligation of the district to accept it.[3]

§ 61. Bonds.—The Political Code authorizes reclamation districts to issue bonds in certain cases.[4] Bonds issued by a de facto reclamation district are valid and binding obligations, and create a lien on its property.[5] Under section 3456 of the Political Code, an assessment which has formed the basis of a bond issue by a reclamation district must be collected and applied only in payment of bonds which have been "issued," but if no bonds have been "issued" then the assessment when collected is to be applied directly in payment of the work done. Bonds are not, however, to be deemed issued under this section until they are actually sold to third persons by the county treasurer and have become obligations binding on the district. The fact that they have been formally executed by the district officers and placed in the hands of the treasurer for sale is not an issuance of them.[6] The code authorizes an action in rem to be brought after delivery of the bonds to the treasurer to have it determined that the bonds are a legal obligation of the district,[7] and it provides that, after publication of the summons, any land owner or person interested may "appear and answer the complaint, which answer shall set forth the facts relied on to show the invalidity of said bonds." While this provision does not mention a demurrer, it has been held that a party was not precluded from interposing such a pleading. By declaring that an interested person might "answer," the legislature intended merely to describe in general terms the character of facts which the party answering should set forth in order to tender an issue. So construed, the statute does not violate

3. Hershey v. Reclamation Dist., 162 Cal. 401, 122 Pac. 1074.

4. Pol. Code, § 3456, amended by Stats. 1917, p. 1198, and Stats. 1919, p. 607, § 3478; § 3480, amended by Stats. 1917, p. 1181, § 3498a.

5. Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505.

6. Moreing v. Shields, 28 Cal. App. 513, 152 Pac. 964.

7. Pol. Code, § 3480.

subdivision 3 of section 25 of article IV of the constitution, which forbids the passage of local or special laws regulating the practice of justice.[8]

Unlike prior acts, the act of 1919, relating to the drainage of wet, swamp and overflowed lands, specifically provides that bonds issued pursuant thereto shall be delivered by the treasurer to the contractor doing the work.[9]

V. CONSTRUCTION AND MAINTENANCE OF WORKS.

§ 62. Property Rights in Drainage and Reclamation Works.—A reclamation district has no right to acquire property except for the purpose of carrying on the work of reclamation and matters incidental thereto.[10] The works belonging to a district are public property, acquired for state purposes.[11] The beneficial title thereto is in the state,[12] and the district has no proprietary interest against it.[13] The cost of rights of way for canals, drains, em-

8. Matter of Bonds of Reclamation Dist. 900, 22 Cal. App. 439, 134 Pac. 726. Prior to 1917 the statute prescribed the contents of the complaint, and it was held in this case that a complaint stated a cause of action which alleged the existence of the district, the calling and holding of a bond election, the carrying of the proposal, the due issuance, execution, and attestation of the bonds, and their delivery to the county treasurer, together with their denomination and dates of maturity and that they were a valid, legal obligation of the district.

9. Stats. 1919, p. 731, amended by Stats. 1921, p. 894. See Van de Water v. Pridham, 33 Cal. App. 252, 164 Pac. 1136, holding that under the former act of March 21, 1903 (Stats. 1903, p. 354), notwithstanding conflicting provisions seeming to contemplate both a delivery of the bonds issued under the act to the contractor doing the work and also their sale by the county supervisors, the proper procedure was their delivery to the contractor.

10. San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374.

11. Reclamation Dist. v. Superior Court, 171 Cal. 672, 154 Pac. 845; Reclamation Dist. v. Superior Court, 151 Cal. 263, 90 Pac. 545; Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668. See COUNTIES, vol. 7, p. 495.

12. Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170. See infra, § 67, as to effect in title of reorganization of district.

13. Reclamation Dist. v. Superior Court, 171 Cal. 672, 154 Pac. 845.

bankments and other work necessary for reclamation, and of materials, acquisition of which is authorized by section 3471 of the Political Code, is a charge upon the lands within the reclamation district. But when acquired, these works constitute a part of the system of reclamation called into existence by state agency in furtherance of the trust under which the grant of swamp land and overflowed lands was made to the state. The whole scheme of reclamation originates with the state, and is carried to a conclusion by agents of the state, that is, the reclamation districts. Hence this property is public property.[14]

An artificial drainage ditch, the right to maintain which across private lands has been granted to a county, is not a part of the navigable waters of the state. The county has no right to use the ditch or the right of way over which it is constructed, for any other purpose than that of drainage. The grantor may maintain fences along or over the ditch, and the county will have no right to interfere with them except in so far as they may interfere with drainage. Much less will the general public have a right to destroy them.[15]

§ 63. Construction and Repair in General.—A reclamation district may purchase existing works from private owners to be incorporated in the general scheme of reclamation.[16] Under a statute providing that whenever a portion of a ditch passes within the limits of a municipality, the consent of the municipality must be obtained,[17] such consent is a prerequisite to the construction of a drainage canal through its streets, without regard to the character of its charter. By giving its consent to

14. Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668.

15. Bolsa Land Co. v. Burdick, 151 Cal. 254, 12 L. R. A. (N. S.) 275, 90 Pac. 532.

16. Pol. Code, § 3455; Reclamation Dist. v. Turner, 104 Cal. 334, 37 Pac. 1038.

17. See Stats. 1903, p. 354 (now repealed by Stats. 1919, p. 731, which enacted a new measure omitting the requirement).

construction a city does not divest itself of the control of its streets and thereby take from it the control of a "municipal affair" as to which, under section 6 of article XI of the constitution, its powers are plenary and exercisable in derogation of general law, as the drainage of swamp-lands, even though the drainage system extends through city streets, is not a municipal affair. And in giving the consent called for by the statute, the municipality may attach to it any conditions not in conflict with the statute itself, which are germane to the subject and calculated to protect the public interests in the street.[18] The fact that reclamation works were constructed without the adoption of a previous plan, furnishes no ground for enjoining their repair.[19] Neither does the omission of lands in the district from an assessment, since it might be that funds were otherwise available for that purpose.[20]

§ 64. Powers and Duties of Trustees.—Under section 3459 of the Political Code the trustees of a reclamation district have broad powers to make repairs.[1] In ordering repairs, the board of trustees has power to enter into contracts for the doing of the work, and may extend the time of the contractors, and enter into new agreements for labor and materials. And their acts in this respect cannot be reviewed by the board of supervisors.[2] A statute[3] imposing the duty of constructing specified reclamation works on a district necessarily imposes it on the district's directing officers, since a corporation can act only through its officers or agents. And under sections 3423 of the Civil Code, and section 526 of the Code of Civil Procedure, providing that an injunction cannot be granted to prevent the execution of a public statute by officers of the law for the public benefit, an injunction will not lie to restrain the

18. Van de Water v. Pridham, 33 Cal. App. 252, 164 Pac. 1136.

19. Hoke v. Perdue, 2 Cal. Unrep. 116.

20. See supra, § 54.

1. See supra, § 22.

2. Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. 1091.

3. Stats. 1913, p. 130.

trustees from carrying out the work, assuming the statute itself to be a valid enactment.[4]

§ 65. Right to Condemn Property.—The legislature has expressly declared that the "draining and reclaiming" of lands is a matter of public utility and benefit,[5] and is one of the purposes for which the right of eminent domain may be exercised.[6] Special power is also given reclamation districts to invoke the power of eminent domain, by section 3471 of the Political Code. "It is beyond question that the digging and maintaining of ditches and drains across private lands is a taking of property." This can be done in California only for a public, not for a private, use, and then only after just compensation. A statute would be therefore unconstitutional which provides that if, on petition of two or more owners for a ditch, the supervisors should find that the ditch "would be conducive to the general welfare of the land owners so petitioning," they should order the work and condemn property for the purpose.[7] But this objection would not apply to a statute which authorizes the property of a private owner to be taken by a public corporation, acting as an agency of the state, for a public use. And it is not necessary that such statute should in terms declare that it was enacted for the public good. The fact that the work would inure mainly to the benefit of land owners within the drainage district, or that less than one hundred and sixty acres were to be drained, would not show that the work of a district organized under the latter act was not a public use.[8]

4. Reclamation Dist. v. Superior Court, 171 Cal. 672, 154 Pac. 845 (also holding the title of the statute sufficient under the constitution to warrant imposing the duty of construction on the district).

5. Laguna etc. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933.

6. Code Civ. Proc., § 1238, subd. 4; Reclamation Dist. v. Superior Court, 151 Cal. 263, 90 Pac. 545. See EMINENT DOMAIN.

7. Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459, holding the act of 1881 (Stats 1881, p. 15), to be unconstitutional.

8. Laguna etc. Dist. v. Charles

The determination of the trustees of a drainage district as to the necessity for draining lands of the district is final, and is not subject to review by the courts in an action to condemn property for that purpose.[9] The purpose of "draining and reclaiming lands" includes the acquisition of a right of way for reclamation works, which, under subdivision 7 of section 1240 of the Code of Civil Procedure, may in turn be subjected to a right of way for a railroad.[10] Where, in the construction of reclamation works, incidental and temporary injury is wrought to adjacent lands, it seems the owner is not entitled to compensation, notwithstanding the constitutional provision[11] prohibiting the taking of private property for public purposes without compensation.[12] And as a county has no proprietary interest in its property as against the state, the legislature may enact a law directing the construction by a reclamation district of certain works the effect of which will be to damage or destroy the property of a county. And it need not provide for any compensation to the county on that account, the constitutional provision not applying.[13]

VI. REORGANIZATION, DIVISION, CONSOLIDATION AND DISSOLUTION.

§ 66. Statutory Provisions in General.—No more than a reference can be made to the elaborate and detailed legislative enactments governing the matters considered in this subdivision of the present article. These statutes cover the

Martin Co., 144 Cal. 209, 77 Pac. 933, upholding the act of 1885 (Stats. 1885, p. 204).

9. Laguna Drainage Dist. v. Charles Martin Co., 5 Cal. App. 166, 89 Pac. 993 (holding it unnecessary to prove that drainage is necessary, but only that the land sought is requisite).

10. Reclamation Dist. v. Superior Court, 151 Cal. 263, 90 Pac. 545. See EMINENT DOMAIN.

11. Const., art. I, § 14.

12. Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 Pac. 1024.

13. Reclamation Dist. v. Superior Court, 171 Cal. 672, 154 Pac. 845. See COUNTIES, vol. 7, p. 495.

transfer of a reclamation district from one county to another,[14] the reorganization of districts,[15] their division,[16] consolidation[17] and dissolution,[18] the change of their boundaries,[19] and the distribution of their funds pro rata among the land owners when the work of reclamation is completed.[20] These provisions should be specially consulted by the interested reader. Concerning the presumptions attending legislative action in these matters it has been said that if the legislature deems it to be a wise and beneficent policy to put out of existence any particular reclamation district which it has created, or to combine two or more districts already in existence into one, or to form a new district embracing lands included within the boundaries of other existing districts, it must be conclusively presumed, in a collateral attack upon the legality of the new district thus formed, that the law-making department has acted with due regard to the rights of the land owners of the old districts, and that its action is in all respects valid. There can be indulged no presumption that the effect of an act of the legislature, if enforced, will be to destroy vested rights or to take property without due process of law, where such effect is not made clear from the language of the act itself.[1]

§ 67. Reorganization.—When the legislature creates a new reclamation district including the territory of an old district, the beneficial title to the property of the old district still remains in the state, which has merely placed the legal title in the hands of other trustees to manage it. The legal title vests ipso facto in the new district without

14. Pol. Code, § 3458.

15. Pol. Code, § 3489. See infra, § 67.

16. Pol. Code, §§ 3481, 3482. See infra, § 68.

17. Pol. Code, §§ 3483, 3489. See infra, § 70.

18. Pol. Code, § 3893. See infra, § 70.

19. Pol. Code, § 3489a.

20. Pol. Code, §§ 3476, 3477.

1. Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277, per Hart, J. See supra, § 6, as to power of legislature over local districts.

further transfer or consideration. But the legislature does not thereby also transfer the debts of the old district, since to do so would burden the added territory of the new district with an indebtedness for which it had received no benefit. Nor can this be accomplished indirectly by a purported purchase of the property of the old district by the new. The legislature cannot so completely destroy the existence of the old district as to leave its indebtedness uncollectible, and if the indebtedness is formally imposed upon the new district, it would still remain chargeable only upon those lands formerly embraced within the old district.[2] The latter clause of section 32 of the act of March 28, 1868, known as the Green Act,[3] which declared that until existing swamp-land districts shall organize under the act, "said districts now formed shall proceed under the laws now in force," applied only to districts which reorganized as contemplated by the act, and did not serve to keep in existence districts which did not undertake such reorganization.[4] A swamp-land clerk, employed by the board of supervisors under section 46 of the Green Act, empowering the board to employ a clerk to attend to matters pertaining to swamp-lands, was a clerk of the board within section 43 of the act requiring that a meeting to reorganize a reclamation district under the act should be called by the clerk of the board of supervisors.[5]

§ 68. **Division in General.**—Under section 3481 of the Political Code, owners representing more than two-thirds of a body of lands within a reclamation district the lands of which "have not been reclaimed," may have their lands set off as an independent district by showing, in addition to the matters required in the customary petition for the formation of a district,[6] that their lands are capable of "an

2. Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170.

3. Stats. 1867–68, p. 507.

4. People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27.

5. Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676.

6. See supra, §§ 11–13.

independent reclamation," and that the district is not prosecuting its work with reasonable diligence, or that the lands sought to be set off are not susceptible of practical reclamation in connection with its other lands. Lands are "reclaimed" within the meaning of this section when the existing works are capable of protecting them from ordinary conditions of detriment, though they may be insufficient under extraordinary conditions.[7] The words "independent reclamation" mean "separate and distinct reclamation."[8] The provisions of the section, prior to 1880, applied only to districts formed prior to May 28, 1868. By amendment of that year[9] it was made applicable generally, though it has been held that, even so, it did not apply to districts existing by virtue of the Green Act, and not organized or reorganized under the Political Code.[10] This amendment was constitutional.[11] It did not repeal existing laws or affect assessment proceedings taken under them.[12] A reclamation district organized under section 3446 of the Political Code rather than under section 3481 is not invalid because composed of the territory of previous districts, when the latter have already ceased to exist.[13]

§ 69. **Proceedings, and Power of Supervisors.**—A petition to the supervisors, under section 3481 of the Political Code, must set out the jurisdictional facts.[14] In the pro-

7. Inglin v. Snider, 163 Cal. 747, 127 Pac. 60.

8. People v. Parvin, 2 Cal. Unrep. 788, 14 Pac. 783.

9. Stats. 1880, p. 6.

10. People v. Parvin, 74 Cal. 549, 16 Pac. 490.

11. People v. Parvin, 74 Cal. 549, 16 Pac. 490 (as against a criticism of the title of the act); People v. Parvin, 2 Cal. Unrep. 788, 14 Pac. 783.

12. People v. Parvin, 2 Cal. Unrep. 788, 14 Pac. 783.

13. People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016.

14. Ralston v. Board of Supervisors, 51 Cal. 592 (holding that a petition for the formation of a new district out of a portion of an old one, under Pol. Code, § 3481, as it stood in 1875, providing that if "the holders of certificates of purchase or patents" for lands within any district formed prior to March 28, 1868, desire to have "their" lands set off from such district, etc., must show that the petitioners were

ceeding, the petitioners stand in practically the same position before the board of supervisors as persons who seek to have a new district formed from lands not previously included in any district, except that in addition to other matters they must show that their lands are capable of an independent reclamation. They are subject to the same discretion on the part of the supervisors to grant or refuse their petition. If the board should find that the existing district was partially reclaimed and that the work of reclamation could be more economically or effectively prosecuted for all concerned by adhering to the original plans, it would have discretion to refuse the proposed segregation.[15] Where there is a conflict of evidence as to whether the lands of the existing district have been reclaimed and as to whether the lands of petitioners are capable of independent reclamation, the determination of these issues by the board of supervisors, involving as it does, the exercise of discretion, cannot be controlled or corrected by the courts.[16] The act of inspecting the lands is a taking of evidence sufficient to create a conflict with testimony given, within the meaning of the rule, and to make the determination of the issues a matter of discretion with the board.[17]

§ 70. Consolidation and Dissolution — *Consolidation.*— Under section 3489 of the Political Code, swamp-land, levee, and reclamation districts existing de facto, and acting as such in good faith and under an attempted compli-

holders of certificates of purchase or patents for all the lands in the proposed new district); Ferran v. Board of Supervisors, 51 Cal. 307 (holding that under section 3481 of the Political Code, as it existed in 1873, a new swamp-land district could be formed from a portion of an old one only if the latter existed prior to May 28, 1868, and the jurisdictional fact must appear in the petition).

15. Inglin v. Snider, 103 Cal. 747, 127 Pac. 60.

16. Inglin v. Snider, 163 Cal. 747, 127 Pac. 60; Rico v. Snider, 134 Fed. 953 (holding that the power of the board cannot be controlled in advance by the interposition of equity). See COUNTIES, vol. 7, p. 450.

17. Inglin v. Snider, 163 Cal. 747, 127 Pac. 60.

ance with law, may be formed into a new corporation which will be a de jure corporation and in all respects valid, and thereafter the existence of the original corporations constituting its constituent elements cannot be challenged in quo warranto proceedings brought against it, such proceedings being as to them a collateral attack.[18]

Dissolution.—The state may not only adopt any policy consistent with reason for prosecuting work of reclamation, but it may also change its policy at will and put out of existence reclamation districts formed by it.[19] It is within the power of the legislature to repeal laws creating reclamation districts, thereby terminating their existence.[20] There is no such thing as the forfeiture of the charter of a reclamation district through the acts or misconduct of its agents or officers,[1] or by their failure to act as a corporation. Any neglect to use the corporate powers in which the public or an individual has an interest may be corrected by the courts. "As such corporations can exist only by legislative sanction, so they can only be deprived of their existence by act of the legislature, or a judicial sentence based upon legislative provision and sufficient

18. People v. La Rue, 67 Cal. 526, 8 Pac. 84.

19. Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170; People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207; People v. Reclamation Dist. No. 108, 53 Cal. 607, 63 Pac. 27 (holding that a swamp-land district, formed under the act of 1861, went out of existence when by later acts the legislature changed its policy for the government and control of the reclamation of swamp and overflowed lands); People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016; Argyle Dredging Co. v. Chambers, 40 Cal. App. 332, 181 Pac. 84; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. See supra, § 3.

20. People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016. (The legislature, with due regard to vested rights, may put reclamation districts out of existence, and create a board of commissioners to manage future work of reclamation. Much more may it create such a board to control existing districts which are continued as legal entities); Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

1. Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866; People v. Reclamation Dist. No. 108, 53 Cal. 346.

facts."[2] The facts that the plan of reclamation adopted and put in force by a reclamation district proves to be impracticable, and that the district is left insolvent, while appropriate for legislative consideration, are no ground for a judgment forfeiting the district's corporate existence.[3]

§ 71. Distribution of Funds—Nature of Land Owner's Claim.—Under the provisions of section 3477 of the Political Code, the purchaser of swamp or overflowed lands acquires an equitable interest in the land by the deposit of his purchase money, and likewise a similar interest in the swamp-land fund, where his money is deposited, upon doing the reclamation work, and both land and money are held in trust by the state for the purchaser. The state could retain the money only upon the purchaser's failure to do what the law requires of him, namely, reclaim the land or expend two dollars per acre to that end, which, when done, entitles him not only to a patent to the land, but a return of his proportion of the unexpended swamp-land fund whenever he shall apply for it. The money being held in trust for him, his right to it is not barred by limitations, until after demand made for payment by him, and repudiation of the trust by the officials liable. It was not the purpose of the law that the state should profit pecuniarily by the transaction. The main object was to cause the land to be reclaimed, and to bring otherwise profitless land under cultivation and make it productive and habitable.[4] The purchasers are under no obligation to reclaim the land,[5] but the state agrees that if they do, it will repay to them this amount of money. The obligation of the state to make this payment is not a lia-

2. Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866. See CORPORATIONS, vol. 7, p. 147.

3. People v. Reclamation Dist. No. 108, 53 Cal. 346.

4. Miller & Lux v. Batz, 142 Cal. 447, 76 Pac. 42; Miller & Lux v. Batz, 131 Cal. 402, 63 Pac. 680.

5. Miller & Lux v. Batz, 131 Cal. 402, 63 Pac. 680. Compare supra, § 4, as to rule under Arkansas Act.

bility created by statute, but arises from contract, through the acceptance by the purchasers of the offer made by the state, and the performance of the work which the state has prescribed as the condition upon which it will make the payment. It is governed by the statute of limitations applicable to written contracts.[6]

§ 72. Assignment and Payment.—The claim of a purchaser of swamp-lands to his pro rata share of the swamp-land fund, under sections 3476 and 3477 of the Political Code, is personal property which becomes due on presentation of the required proof, and the right to which remains in the purchaser and passes to his assigns. This is true even though he may deed the land to someone else pending payment, as the indebtedness is not a covenant real, and in no way follows the land.[7] Delay in payment could not in any way affect the time when the money became due. The provision of the act of March 28, 1874, that the fund of a district shall be paid out "only for the purpose of reclaiming such land, or to the owners of such land, after reclamation," does not change the rule, as the purchaser will be presumed to have been "the owner after reclamation." The word "assigns" in section 3477 of the Political Code refers to one to whom the indebtedness has been assigned by the purchaser, and not to his grantee of the land.[8]

6. McCord v. Slavin, 143 Cal. 325, 76 Pac. 1104 (holding also that the provisions of the act of March 24, 1893 [Stats. 1893, p. 341], for the sale of lands uncovered by the drainage or recession of inland lakes, and authorizing their reclamation in the same manner and subject to all the provisions of law regulating the reclamation of swamp and overflowed lands, constitute a contract between the purchaser and the state, entitling the purchaser to receive his proportion of the unexpended swamp-land fund on reclamation being completed, as provided by section 3477 of the Political Code); Miller & Lux v. Batz, 131 Cal. 402, 63 Pac. 680.

7. Carpenter v. San Francisco Sav. Union, 128 Cal. 516, 61 Pac. 92; Miller & Lux v. Batz, 6 Cal. Unrep. 481, 61 Pac. 935. See COVENANTS, vol. 7, p. 721.

8. Carpenter v. San Francisco Sav. Union, 128 Cal. 516, 61 Pac. 92.

Where the requisite proof of the completion of reclamation, or of the expenditure of two dollars per acre therefor, has been made to the supervisors of the county in which the reclamation district is situated, as required by section 3476 of the Political Code, and proceedings are had under section 3477 which entitle the purchaser to reimbursement from the swamp-land fund as therein provided, it becomes the duty of the county treasurer of the county having custody of the swamp-land fund to disburse it accordingly. This rule is not affected by the fact that, after the creation of the fund the county was divided and the reclamation district formed wholly within the new county, the proof under section 3476 was not made to the supervisors of the county holding the fund, and that the certificate of the register of the state land office was not forwarded to the treasurer of the county in which the district was situated, as prescribed by section 3477, but was sent to the treasurer of the elder county who held the fund.[9]

VII. CLAIMS AND ACTIONS.

§ 73. In General.—The Drainage Act requires that the person awarded the contract for the construction of drains shall execute a bond running to the county and conditioned for the faithful execution of the contract and for the payment by him for all labor and materials.[10] This provision contains the sole authority vested in the board of supervisors to provide for the protection of materialmen and laborers. And a materialman cannot recover on a bond which contains provisions showing it was not executed under the Drainage Act and which cannot be deemed a common-law bond.[11] A statute[12] providing for the vali-

9. California Pastoral etc. Co. v. Whitson, 129 Cal. 376, 62 Pac. 28. See County of Kings v. County of Tulare, 119 Cal. 509, 51 Pac. 866, for a history of the custody of the "swamp-land fund."

10. Stats. 1919, p. 731. There was a similar provision in the act of 1903 (Stats. 1903, p. 354).

11. Hoffman v. Kennedy, 35 Cal. App. Dec. 172, 199 Pac. 341. See BONDS, vol. 4, p. 354.

12. Stats. 1885, p. 78.

dating and allowance of claims, accruing under a previous unconstitutional act,[13] "for work done or materials furnished" a drainage district, does not validate a judgment in condemnation proceedings awarding a sum to the claimant for his land, when the proceedings were never completed to a point where title passed to the district.[14]

§ 74. Liability to Suit.—Prior to 1899, a reclamation district could sue only for one purpose, namely, to collect assessments,[15] and could not be sued for any purpose,[16] there being no legislative provision authorizing actions against it.[17] In that year, however, it was provided that after the election of trustees a district should be deemed organized and should have power to sue and be sued.[18] This provision was not retroactive and did not revive a cause of action for indebtedness of the district already barred by limitations. Nor did it apply to districts formed under special acts and not subject to the provisions of the Political Code.[19] In this connection it should be noted that section 3478 of the Political Code which now brings all reclamation districts within the operation of the code, declares that the provision shall not affect indebtedness of the districts theretofore incurred, excepting as to the method of liquidating such indebtedness. There was a similar provision in the act of 1885 and it was held that

13. Stats. 1880, p. 123.

14. Callahan v. Dunn, 78 Cal. 366, 20 Pac. 737.

15. Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401. See supra, §§ 55, 56 and 57.

16. San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374; Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401 (holding district not liable for negligence); Sels v. Greene, 88 Fed. 129 (holding district not liable to injunction to restrain nuisance); Sels v. Greene, 81 Fed. 555 (holding district not liable for negligence).

17. San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374; Sels v. Greene, 81 Fed. 555.

18. Pol. Code, § 3453, as amended in 1899.

19. San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374.

its effect is that the code should not in any respect apply to existing debts.[20]

The rule that reclamation districts cannot be sued in the absence of statute is equally applicable to drainage districts. Therefore, unless it is so provided by law, such a district cannot be sued for negligence in the construction of its works by one who thereby sustains damage.[1] This rule does not, however, preclude one from holding the trustees personally liable.[2]

§ 75. Venue—Qualification of Judge.—Section 16 of article XII of the constitution, prescribing the venue of actions against corporations,[3] applies only to private corporations, and does not govern the venue of an action against a drainage district. The general rule that the legal residence of corporations, including municipal corporations, is where their principal place of business, or principal seat of government, is located, applies to drainage districts. A drainage district created by special act of the legislature,[4] which provides that the reclamation board, which is its governing body, shall have its office in a certain city, is thereby given a legal residence in that city, though it may own property in several counties, and the venue of suits against it is to be determined by that fact.[5]

Qualification of judge.—Subdivision 5 of section 170 of the Code of Civil Procedure, as amended in 1915,[6] provides that in actions by or against the state reclamation board or reclamation, levee, swamp-land or drainage districts, or

20. San Francisco Sav. Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374.

1. Proper v. Sutter Drainage Dist., 35 Cal. App. Dec. 695, 200 Pac. 664.

2. Proper v. Sutter Drainage Dist., 35 Cal. App. Dec. 695, 200 Pac. 664; Sels v. Greene, 88 Fed. 129.

3. See CORPORATIONS, vol. 7, p. 118, where the provision is quoted.

4. Stats. 1913, pp. 252–276, amending Stats. 1911 (Ex. Sess.), pp. 117, 118.

5. Gallup v. Sacramento etc. Drainage Dist., 171 Cal. 71, 151 Pac. 1142.

6. Stats. 1915, p. 531.

any public agency, trustee, officer or employee thereof, affecting real property or any easement or right of way, levee, embankment, canal, or any work provided or approved by the reclamation board of the state, disqualifies the judge or justice of the county where the property or work is situated, unless the parties waive the disqualification. This legislation was held constitutional, and not to be special or class legislation, though irrigation and similar districts are not included.[7]

§ 76. Procedure in General.—Since the right to sue a reclamation district is purely statutory,[8] it follows that one bringing an action against a district must allege facts bringing him clearly within the terms of the statute.[9] An allegation in a complaint to enjoin the repair of reclamation works that plaintiff's land will be flooded thereby is a mere expression of opinion, and not ground for injunctive relief.[10] The pleadings in mandamus proceedings against officers of a reclamation district are governed by the general rules relating to such proceedings.[11]

Enforcement of judgment against district.—Under ordinary circumstances, a reclamation district has no property

7. Sacramento etc. Drainage Dist. v. Rector, 172 Cal. 385, 156 Pac. 506. See JUDGES.

8. See supra, § 74.

9. San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374, holding that to render a reclamation district liable to suit under the act of March 10, 1885, it would be necessary to allege that it was prosecuting the objects for which it was created and had been doing so ever since its creation, the objects being the reclamation of land and the keeping in repair the works necessary for that purpose.

10. Hooke v. Perdue, 2 Cal. Unrep. 116.

11. See Moreing v. Shields, 28 Cal. App. 513, 152 Pac. 964, holding that an answer in mandamus proceedings to compel the trustees of a reclamation district to call in an installment of an assessment in order to meet obligations which they had agreed to pay in cash on a given date, which alleges that the parties to the contract had expected that the proceeds of a bond issue would be available for the payment on that date, which was the reason for fixing it, tenders no material issue, as in the absence of a bond issue it is the duty of the trustees to resort to the other method available to provide the cash. See MANDAMUS.

subject to execution. Its reclamation works, belonging to a public corporation and devoted to a public use, are not subject to levy and sale to satisfy a judgment.[12] It would seem, however, that a judgment upon a claim would have the effect of establishing it so that it may then be presented for allowance as an audited claim.[13]

12. San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374; Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401.

13. See COUNTIES, vol. 7, p. 569.

(C. M.)

DRUGS AND DRUGGISTS.

1. In General.
2. Regulation of Sale of Drugs.
3. Itinerant Drug Venders—Licenses.

§ 1. In General.—This article covers the use and sale of drugs generally. No attempt has been made, however, to state the provisions of the statutes upon the subject, except in so far as they have been construed and applied by the courts. The following matters are not within the scope of this article and are treated in other places in this work: the regulations governing the use and sale of poisons; criminal liability for the use of narcotics;[1] the administration of drugs by physicians and their liability for malpractice or unprofessional conduct in connection therewith;[2] the employment of drugs in the commission of particular crimes;[3] and the arrest and detention of drug addicts and their treatment at public institutions.[4]

The term "drug" has been defined as any vegetable, animal or mineral substance used in the composition of medicines, any substance used in dyeing operations or any ingredient used in chemical preparations employed in the arts.[5] In California, however, the word is by statute given a somewhat narrower significance. For instance, a "drug" is defined, in the Penal Code in punishing the sale of an adulterated article, as including all medicines for internal or external use, antiseptics, disinfectants, and cosmetics.[6]

1. See POISONS.
2. See PHYSICIANS AND SURGEONS.
3. See HOMICIDE; RAPE.
4. See HOSPITALS AND ASYLUMS; INSANE PERSONS.
5. See 9 Ruling Case Law, 696.
6. Pen. Code, § 383. See also Stats. 1907, p. 230, § 2.

Cases are cited in this article to and including 187 Cal., 47 Cal. App. and 208 Pac.

In California the law makes it a public offense to administer anesthetics, narcotics or intoxicants to another with intent to enable one to commit a felony,[7] or to administer drugs to an animal entered in a race or in a competition for a prize.[8] It also prohibits the manufacture, sale or transportation of adulterated, mislabeled or misbranded drugs, and provides the means for enforcing its provisions in this respect.[9] In this connection it provides for the procuring of samples and the analysis of suspected drugs, and directs the state board of health to report violations of the law to the district attorney of the proper county, who must thereupon prosecute the offender.[10]

§ 2. Regulation of Sale of Drugs.—There is no doubt but that the sale of drugs is a proper and legitimate field for police regulation.[11] Accordingly, the legislature has enacted the so-called Pharmacy Act, which regulates the practice of pharmacy; provides for a state board of pharmacy, and for the registration of pharmacists; and prohibits anyone from manufacturing or dispensing drugs or poisons except registered pharmacists or assistant pharmacists, with certain exceptions in case of dealers in rural

7. Pen. Code, § 222. See HOMICIDE, as to administering poison with intent to kill.

8. Act of March 23, 1901; Stats. 1901, p. 553. See ANIMALS, vol. 2, p. 64.

9. Pen. Code, § 380 (omitting to label or wrongfully labeling drugs); § 382 (adulterating food, drugs or liquors); § 383 (sale of adulterated food, drinks or drugs); Act of March 26, 1895, Stats. 1895, p. 71 (adulteration of food or drugs); Act of March 11, 1907, Stats. 1907, p. 230; amended 1913, Stats. 1913, p. 767; amended 1915, Stats. 1915, p. 172 (manufacture, sale or transportation of adulterated, mislabeled or misbranded drugs); Stats. 1905, p. 535, § 11, amended 1909, Stats. 1909, p. 1015 (adulteration of drugs recognized by the pharmacopoeia of the United States); Pol. Code, § 2979 (duties of state board of health).

10. Stats. 1907, p. 230. Power to compel disclosure of ingredients of proprietary medicines, see 1 A. L. R. 1476, note.

11. See CONSTITUTIONAL LAW, vol. 5, p. 705. See 9 Ruling Case Law, 697. As to hours of labor of employees selling retail drugs and medicines, see LABOR. As to Harrison Narcotic Act, see 13 A. L. R. 858, note.

districts.[12] This act also allows grocers and dealers generally to sell certain drugs and chemicals without restriction. In this connection the Pharmacy Act and the so-called Poison Act deal in some particulars with the same subject matter. Yet they are in pari materia and are to be construed and harmonized if possible. Therefore, while the state board of pharmacy is given power by the Poison Act to promulgate such regulations not inconsistent with the laws of California as may be necessary to protect the public in the sale of poisons, it cannot deprive a grocer or dealer of any right conferred by the Pharmacy Act.[13]

§ 3. Itinerant Drug Venders—Licenses.—The statute forbids any person from conducting as itinerant vender the business of selling or disposing of drugs, nostrums, ointments or appliances for the treatment of diseases, deformities or injuries without first obtaining a license therefor. This act is a valid exercise of the power of the state over persons and business within its borders and of the police power of the state, and it is not repugnant to the fourteenth amendment of the federal constitution. It was intended solely as a regulatory measure and the amount of fee exacted, to wit, one hundred dollars for each half year, is not such as can be held more than is reasonably necessary for the purpose of the regulation. The term "itinerant venders" as used in the act is defined as including all persons who carry on the business of selling or

12. Stats. 1905, p. 535; amended Stats. 1907, p. 766; Stats. 1909, p. 1013; Stats. 1915, p. 535. See Stats. 1913, p. 698, amended Stats. 1913, p. 698, as to revocation of registration for violation of Poison Act; Stats. 1906, Ex. Sess., p. 82 (restoration of records of registration after San Francisco fire).

13. In re Potter, 164 Cal. 735, 130 Pac. 721, holding that under the statutes as they stood in the early part of 1913 a grocer could sell ant poison containing arsenic if he sold it in the original packages. See In re Potter, 26 Cal. App. 45, 146 Pac. 62, holding that the amendment of the Poison Act on June 11, 1913, Stats. 1913, p. 694, precluded a grocer from selling such ant poison. See the "Poison Act," Stats. 1907, p. 124, amended Stats. 1909, p. 422; 1911, p. 1106; 1913, p. 692; 1915, pp. 863, 1066. See POISONS.

disposing of drugs by passing from house to house, or by haranguing people in public places or who use the customary devices for attracting crowds and therewith offering their wares for sale. This definition is broad enough to include hawkers and peddlers.[14] Section 3382 of the Political Code purports to impose a license tax upon persons selling certain goods, including drugs or medicines, at a fixed place of business. But this section is no longer operative in view of section 12 of article XI of the constitution, denying the legislature to impose taxes for local purposes.[15]

14. In re Gilstrap, 171 Cal. 108, Ann. Cas. 1917A, 1086, 152 Pac. 42, holding also that the act is not unconstitutional because of the third proviso of section 2 of the act relating to the exemption of ex-Union soldiers and sailors.

15. Ex parte Campbell, 74 Cal. 20, 5 Am. St. Rep. 418, 15 Pac. 318; People v. Martin, 60 Cal. 153. See LICENSES.

DRUNKENNESS.

See CONTRACTS, vol. 6, p. 34; CRIMINAL LAW, vol. 7, p. 809; DEEDS, ante, p. 119; INTOXICATING LIQUORS.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, vol. 5, p. 537.

DUELING.

1. As a Crime.
2. Civil Rights Affected.

§ 1. Dueling as a Crime.—A duel is any combat with deadly weapons, fought between two or more persons, by previous agreement or upon a previous quarrel.[1] While at one time the statute against dueling required a fatal result from the combat, to complete the offense,[2] since the adoption of the codes, it is not only a public offense to fight a duel in any case, but also to send or accept a challenge to fight a duel,[3] to post or publish another for not fighting a duel or for not sending or accepting a challenge to duel,[4] or to leave the state with intent to evade the laws against dueling.[5]

When a duel is fought outside California and a wound is inflicted upon a person, whereof he dies in this state, the jurisdiction of the offense is in the county where the death happens.[6] If an inhabitant of the state leaves it for the purpose of evading the laws against dueling, jurisdiction is in the county of which he was an inhabitant when the offense was committed.[7] Self-defense is not available as a plea to one who by prearranged duel, or by consent, enters into a deadly mutual combat in which he slays his adversary.[8]

1. Pen. Code, § 225.
2. Stats. 1855, p. 152; Stats. 1850, p. 229; People v. Bartlett, 14 Cal. 651.
3. Pen. Code, §§ 226–228.
4. Pen. Code, § 229.
5. Pen. Code, § 231.
6. Pen. Code, § 779.
7. Pen. Code, § 780.
8. People v. Hecker, 109 Cal. 451, 30 L. R. A. 403, 42 Pac. 307. As to self-defense generally, see HOMICIDE.

Cases are cited in this article to and including 187 Cal., 47 Cal. App. and 208 Pac.

§ 2. Civil Rights Affected.—The constitution provides that since its adoption, any citizen who fights a duel, or sends or accepts a challenge to fight one, either within this state or elsewhere, or who acts as second, or knowingly aids or assists in any manner those thus offending, shall not be allowed to hold any office of profit, or enjoy the right of suffrage.[9] And it is expressly provided in the Civil Code that one who slays or permanently disables another in a duel in this state, is liable for and must pay all debts of the one slain or so disabled,[10] and is also liable for the support of his widow or wife and minor children, in such manner and at such cost, either by aggregate compensation in damages to each or by a monthly, quarterly or annual allowance, to be determined by the court.[11]

9. Const., art. XX, § 2. To same effect, see Pen. Code, § 228.

10. Civ. Code, § 3348.

11. Civ. Code, § 3347.

DURESS.

See CONTRACTS, vol. 6, p. 65; CRIMINAL LAW, vol. 7, p. 809; DEEDS, ante, p. 84; EXTORTION; FALSE IMPRISONMENT; THREATS.

DYING DECLARATIONS.

See HOMICIDE.

EASEMENTS.

I. In General.
II. Rights of Way.

I. In General.

1. Scope of Article.
2. Definitions and Distinctions—Characteristics.
3. Easements Appurtenant and in Gross.
4. Particular Easements Enumerated.
5. Creation in General.
6. Extent.
7. Location and Alteration.
8. Use of and Interference With.
9. Transfer of Easement.
10. Transfer of Servient Tenement.
11. Severance of Dominant and Servient Estates.
12. Extinguishment Generally.
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14. Actions—Damages.

II. Rights of Way.

15. In General.
16. Ways Created by Sale of Lot With Reference to Map.
17. Ways of Necessity.
18. Degree of Necessity.
19. Location and Duration.

Cases are cited in this article to and including 187 Cal., 47 Cal. App. and 208 Pac.

I. IN GENERAL.

§ 1. Scope of Article.—This article deals with easements in general, their nature and classification, their creation by grant (their creation by adverse possession having been discussed in an earlier article),[1] their extent, the mutual rights and responsibilities of the parties to an easement, the effect of transfers of the estates involved, the extinguishment of easements and the remedies for their protection. The only particular type of easements discussed is that of private ways, other types being treated in separate articles.[2] The reader is also referred to the appropriate titles elsewhere in this work for principles relating to public easements,[3] easements acquired under the power of eminent domain,[4] and easements incident to the ownership of adjoining land[5] and for matters relating to the instruments by which easements are created.[6] The kindred subjects of covenants running with land and licenses are discussed in independent articles.[7]

§ 2. Definitions and Distinctions—Characteristics.—An easement has been variously defined to be—a right which subjects land or a tenement to some service for the use of another land or tenement which belongs to another master; or an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion or lawful use out of or over the estate of another;[8] or a privilege without profit, which the owner of one tenement has a right to en-

1. See ADVERSE POSSESSION, vol. 1, p. 592 et seq.
2. See MINES AND MINERALS; PARTY-WALLS; WATERS; WHARVES.
3. See DEDICATION, vol. 9, p. 1; HIGHWAYS; PARKS AND SQUARES; WATERS; WHARVES.
4. See EMINENT DOMAIN.
5. See ADJOINING LAND OWNERS, vol 1, p. 388.
6. See DEEDS, ante, p. 84.
7. See COVENANTS, vol. 7, p. 708; LICENSES.
8. Los Angeles etc. Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308, quoting from Bouvier's Law Dictionary, and Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432, 3 L. R. A. 789, 20 N. E. 581.

joy in respect of that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former.[9]

The essential qualities of easements are: 1. They are incorporeal. 2. They are imposed on corporeal property, and not upon the owner thereof. 3. They convey no right to a participation in the profits arising from such property. 4. They are imposed for the benefit of corporeal property; and 5. In the case of an easement appurtenant there must be two distinct tenements involved.[10] The interest in an easement may be a freehold or a chattel real according to its duration.[11]

The distinction between a license and an easement is oftentimes very subtle and difficult to discern,[12] and the words "easement" and "license" are sometimes used indiscriminately, even by the courts.[13] Yet the two are distinct from each other. An easement always implies an interest in the land in and over which it is to be enjoyed,[14]

9. Gray v. McWilliams, 98 Cal. 157, 35 Am. St. Rep. 163, 21 L. R. A. 593, 32 Pac. 976, quoting from Goddard on Easements.

"An easement is said to be a permanent interest in another's land, with a right at all times to enter and enjoy it." Emerson v. Bergin, 76 Cal. 197, 18 Pac. 264, quoting from Hilliard on Real Property. See also Cave v. Crafts, 53 Cal. 135, where it is said that "the idea and definition of an easement is a privilege off and beyond the local boundaries of the land and tenement conveyed."

10. Kellett v. Ida Clayton etc. Road Co., 99 Cal. 210, 33 Pac. 885.

11. Appeal of North Beach etc. R. R. Co., 32 Cal. 499, quoting Washburn on Easements. See Corea v. Higuera, 153 Cal. 451, 17 L. R. A. (N. S.) 1018, 95 Pac. 882, saying, "An easement is real property." Appeal of North Beach etc. R. R. Co., 32 Cal. 499, holding an easement to be subject to taxation on the basis of real property. See TAXATION.

12. Cohen v. Adolph Kutner Co., 177 Cal. 592, L. R. A. 1918D, 410, 171 Pac. 424. See LICENSE.

13. Cohen v. Adolph Kutner Co., 177 Cal. 592, L. R. A. 1918D, 410, 171 Pac. 424; Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974.

14. Patchett v. Pacific Coast Ry. Co., 100 Cal. 505, 35 Pac. 73; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Appeal of North Beach etc. R. R. Co., 32 Cal. 499; Rowe v. Wurster, 33 Cal. App. Dec. 654, 194 Pac. 725.

whereas a license carries no such interest.[15] While a profit a prendre has always been considered in law a different species of right from an easement, it is similar to an easement, in that it is an interest in land, and may be either in gross or appurtenant to other land.[16] There are certain easements given by the law to every manner of land, on the ground that without them there would be no security in the enjoyment of the land by its owner. They are said to be inherent in the land ex jure naturale, and are often termed "natural rights."[17] These easements have been discussed at length in an earlier article.[18]

§ 3. Easements Appurtenant and in Gross.—Easements are divided generally into two classes, namely, easements appurtenant and easements in gross. An easement appurtenant is one the ownership of which is attached to a particular parcel of land; an easement in gross is a mere personal right belonging to a given individual irrespective of the ownership of property.[19] This rule is embodied in the following section of the Civil Code:

"A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another."[20]

In the case of an easement appurtenant, "the land to which an easement is attached is called the dominant

15. Appeal of North Beach etc. R. R. Co., 32 Cal. 499.

16. Painter v. Pasadena etc. W. Co., 91 Cal. 74, 27 Pac. 539. As to nature of right to take water from pipes, see 5 Cal. Law Rev. 340.

17. Gray v. McWilliams, 98 Cal. 157, 35 Am. St. Rep. 163, 21 L. R. A. 593, 32 Pac. 976.

18. See ADJOINING LAND OWNERS, vol. 1, p. 388.

19. Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354 (where, however, it is said that "if the grant is of an easement, it is always for the benefit of other premises"); 1 Ruling Case Law, pp. 737, 739. The provisions of the Civil Code would seem to imply that, strictly speaking, only appurtenant servitudes are to be referred as easements. Civ. Code, §§ 801, 803, quoted infra.

20. Civ. Code, § 662; Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Crooker v. Benton, 93 Cal. 365, 28 Pac. 953.

tenement; the land upon which a burden or servitude is laid is called the servient tenement";[1] whereas in the case of an easement in gross there is no dominant tenement.[2] Whether an easement in a given case is appurtenant or in gross is determined mainly by the nature of the right and the intention of the parties creating it.[3] And in this connection, it may be said to be a general rule that an easement is never presumed to be attached to the person of the grantor, when it can fairly be construed to be appurtenant to some other estate.[4] If the right in question is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant and not an easement in gross.[5] While it has been said that it is difficult to see how there can be a valid creation of a servitude without some designation or description of the dominant tenement,[6] it has been held that the nature of an easement, whether personal or appurtenant, may be determined by evidence aliunde the deed, and that an easement reserved by a grantor for the benefit of a tract of land retained by him may be deemed appurtenant thereto, though it is not described in the deed.[7] However this may be, an un-

1. Civ. Code, § 803. Kellett v. Ida Clayton etc. Road Co., 99 Cal. 210, 33 Pac. 885; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

2. Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

3. Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213.

4. Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213.

5. Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213.

6. Werner v. Graham, 181 Cal. 174, 183 Pac. 945. Citing Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

7. Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827. The latter case considers the case of Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354, to the contrary, and concludes that it has been overruled by the Hopper case. Subsequently the Wagner case was cited approvingly by the supreme court in

qualified grant of an easement with words of inheritance necessarily creates an easement appurtenant, since it is inconsistent with the peculiarly personal character of an easement in gross.[8]

§ 4. Particular Easements Enumerated.—Section 801 of the Civil Code provides:[9]

"The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements: 1. The right of pasture; 2. The right of fishing; 3. The right of taking game; 4. The right of way;[10] 5. The right of taking water,[11] wood,[12] minerals,[13] and other things; 6. The right of transacting business upon land; 7. The right of conducting lawful sports upon land; 8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;[14] 9. The right of receiving water from or discharging the same upon land; 10. The right of flooding land;[15] 11. The right of having water flow without diminution or disturbance of any kind;[16] 12. The

Werner v. Graham, 181 Cal. 174, 183 Pac. 945, so that there is some doubt as to the rule. See DEEDS.

8. Nilson v. Wahlstrom, 40 Cal. App. 237, 180 Pac. 358. Citing Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874, and Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

9. This section merely enumerates the different kinds of burdens or servitudes upon lands that may be attached as incident or appurtenant to the other lands, and makes no pretense of prescribing or regulating the manner of acquiring them. McDaniel v. Cummings, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795.

10. Patchett v. Pacific Coast Ry. Co., 100 Cal. 505, 35 Pac. 73; Rowe v. Wurster, 33 Cal. App. Dec. 654, 194 Pac. 725; Beem v. Reichman, 36 Cal. App. 258, 171 Pac. 972; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213. See infra, §§ 15–19.

11. Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

12. Yuba Cons. Goldfield v. Hilton, 16 Cal. App. 228, 116 Pac. 712, 715 (driftwood).

13. Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 20 L. R. A. (N. S.) 211, 99 Pac. 483.

14. See ADJOINING LAND OWNERS, vol. 1, p. 400. As to implied easement of light and air over private alley or right of way, see note in 9 A. L. R. 1634.

15. Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; McDaniel v. Cummings, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213. See ADJOINING LAND OWNERS, vol. 1, p. 395.

16. McDaniel v. Cummings, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Farmer v.

right of using a wall as a party-wall;[17] 13. The right of receiving more than natural support from adjacent land or things affixed thereto;[18] 14. The right of having the whole of a division fence maintained by a coterminous owner; 15. The right of having public conveyances stopped, or of stopping the same on land; 16. The right of a seat in church; 17. The right of burial."

Section 802 provides:

"The following land burdens, or servitudes upon land, may be granted and held, though not attached to land: One. The right to pasture, and of fishing and taking game. Two. The right to a seat in church. Three. The right of burial. Four. The right of taking rents and tolls.[19] Five. The right of way.[20] Six. The right of taking water, wood, minerals,[1] or other things."

§ 5. Creation in General.—An easement may be either created by a grant, express or implied, or acquired by prescription.[2] In the former case, however, the party creating must be one who has a vested estate in the servient tenement.[3] A tenant in common cannot create an easement upon the common land.[4]

Ukiah Water Co., 56 Cal. 11. See WATERS.

17. See PARTY-WALLS.

18. See ADJOINING LAND OWNERS, vol. 1, p. 405.

19. But the right of exemption from paying toll, conferred by agreement upon an individual, is not an easement. Kellett v. Ida Clayton etc. Road Co., 99 Cal. 210, 33 Pac. 885.

20. See infra, §§ 15–19.

1. Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 20 L. R. A. (N. S.) 211, 99 Pac. 483.

2. Weller v. Brown, 160 Cal. 515, 117 Pac. 517; McDaniel v. Cummings, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795; Emerson v. Bergin, 76 Cal. 197, 18 Pac. 264; Carey v. Rae, 58 Cal. 159; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; American Co. v. Bradford, 27 Cal. 361; Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974; Pinheiro v. Bettencourt, 17 Cal. App. 111, 118 Pac. 941; Yuba Cons. Goldfields v. Hilton, 16 Cal. App. 228, 116 Pac. 712, 715; Bell v. Sausalito etc. Ferry Co., 4 Cal. Unrep. 53, 33 Pac. 449. See COVENANTS, vol. 7, p. 748. As to acquisition of easement by prescription, see ADVERSE POSSESSION, vol. 1, pp. 592 et seq.

3. Civ. Code, § 804; Knoch v. Haizlip, 163 Cal. 146, 124 Pac. 998.

4. Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778; Pfeiffer v. Regents of University, 74 Cal. 156, 15 Pac. 622. This rule, however, does not prevent the creation of an easement by the parti-

Since an easement is an interest in land, an express grant thereof must be in writing, and the writing must describe the interest conveyed.[5] But the exact form is immaterial when it appears to be the true construction of the terms of a grant that it was the well understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor. No matter how such purpose may be expressed, whether it be in the form of a condition or covenant or reservation or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass with the lands to all subsequent grantees.[6] Even an oral agreement, if executed and based upon a valuable consideration, will convey an equitable title to the easement agreed upon.[7] And parol evidence has been held admissible to prove that in the execution of a deed a provision theretofore agreed upon creating an easement was fraudulently omitted.[8] Where a deed conveys an easement in express terms, the acceptance of the deed brings the easement into existence without any further act on the part of the grantee showing his acceptance on the easement itself.[9] Words of inheritance are not requisite to transfer the fee

tion of such common estate. See, for instance, Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351. See CO-TENANCY, vol. 7, p. 328.

5. Long v. Cramer Meat etc. Co., 155 Cal. 402, 101 Pac. 297; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223. See FRAUDS, STATUTE OF.

6. Weller v. Brown, 160 Cal. 515, 117 Pac. 517, quoting Vice-Chancellor Van Fleet in Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190. As to construction of deeds according to intention, see DEEDS, ante, p. 84.

7. Rubio Cañon etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570; Flickinger v. Shaw, 87 Cal. 126, 22 Am. St. Rep. 234, 11 L. R. A. 134, 25 Pac. 268.

8. Peterson v. Lauretzen, 68 Cal. 19, 8 Pac. 607.

9. Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

in an easement,[10] the rule in this respect being the same as that governing transfers of real property generally;[11] and as between the parties an express grant of an easement need not be recorded but takes effect upon its execution.[12]

The intention of the parties to a grant of an easement is to be determined by a fair interpretation of the grant or reservation creating the easement,[13] in light of the apparent purpose of protection or advantage to the several estates concerned, as gathered from the circumstances confronting the parties.[14] It has been said, however, that in case a grantor reserves an easement in land conveyed by him the covenant and reservation in case of doubt are to be construed most strongly against the covenantor or grantor.[15]

§ 6. **Extent.**—The code provides that "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired."[16] For the purpose of ascertaining the extent and limits of the right where it is founded on a grant, the entire in-

10. Northwestern Pac. R. Co. v. Humboldt Milling Co., 186 Cal. 599, 200 Pac. 9.

11. See DEEDS, p. 84.

12. Pollard v. Rebman, 162 Cal. 633, 124 Pac. 235. See DEEDS, ante, p. 197; RECORDS.

13. Berryman v. Hotel Savoy Co., 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677. As to construction of deeds generally, see DEEDS, ante, p. 243.

14. Cohen v. Adolph Kutner Co., 177 Cal. 592, L. R. A. 1918D, 410, 171 Pac. 424; Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974.

15. Currier v. Howes, 103 Cal. 431, 37 Pac. 521. See DEEDS, ante, p. 259.

16. Civ. Code, § 806; C. F. Lott Land Co. v. Hegan, 177 Cal. 169, 169 Pac. 1035; Colegrove Water Co. v. Hollywood, 151 Cal. 425, 13 L. R. A. (N. S.) 904, 90 Pac. 1053; Winslow v. Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 7 Ann. Cas. 851, 5 L. R. A. (N. S.) 851, 84 Pac. 191; Los Robles Water Co. v. Stoneman, 146 Cal. 203, 79 Pac. 880; Joseph v. Ager, 108 Cal. 517, 41 Pac. 422; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Allen v. San Jose etc. W. Co., 92 Cal. 138, 15 L. R. A. 93, 28 Pac. 215; McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393 (holding this section applicable to public highways); Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 67; Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. 167; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213.

strument is to be considered, in view of the circumstances surrounding its execution and the situation of the parties and the property.[17] But nothing passes as incident to the grant of an easement except what is necessary for its reasonable and proper enjoyment.[18] Where the terms of the grant are clear, the use by the grantee of less than the whole privilege conferred does not affect his right to claim the whole at any time.[19] But where the grant is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to that particular course or manner.[20] Where the easement is acquired by prescription, its character and extent are fixed and determined by the user under which it is gained.[1] In any case the question of the extent of the respective rights and duties of the owners of the two tenements involved towards each other is one of fact to be determined by the jury.[2]

§ 7. Location and Alteration.—Where an unlocated right of way is granted or reserved, the owner of the servient estate may in the first instance designate a reasonable way, and if he fails to do so, the owner of the

17. Winslow v. Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 7 Ann. Cas. 851, 5 L. R. A. (N. S.) 851, 84 Pac. 191; Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

18. Parks v. Gates, 186 Cal. 151, 199 Pac. 40; Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

19. Santa Ana v. Santa Ana Valley Irr. Co., 163 Cal. 211, 124 Pac. 847; Winslow v. Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 7 Ann. Cas. 851, 5 L. R. A. (N. S.) 851, 84 Pac. 191.

20. Winslow v. Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 7 Ann. Cas. 851, 5 L. R. A. (N. S.) 851, 84 Pac. 191; Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 67.

1. Civ. Code, § 806, quoted supra; Civ. Code, § 806; North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69; Joseph v. Ager, 108 Cal. 517, 41 Pac. 422; Allen v. San Jose etc. W. Co., 92 Cal. 138, 15 L. R. A. 93, 28 Pac. 215. The terms of the instrument constituting color of title cannot be considered in this connection. Knight v. Cohen, 7 Cal. App. 43, 93 Pac. 396.

2. Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

dominant estate may designate it.[3] In the latter event, however, the claimant must select a route that is reasonable as to both parties in view of all the circumstances and that will not unreasonably interfere with the grantor in the enjoyment of his estate.[4] If the parties fail to agree upon a location satisfactory to both, a court of equity, upon the application of either of them, has power to fix a location.[5] When once fixed by either method, the location and extent of an easement cannot be materially changed by either party without the consent of the other,[6] even though the change in question might benefit the servient estate.[7]

An easement acquired for a particular purpose is limited to such purpose and cannot be applied to any other.[8] And the owner of an easement cannot change the character of the servitude or materially increase the burden upon the servient estate or injuriously affect the rights of other persons.[9] For instance, the grant of a

3. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 Pac. 271; Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104; Ballard v. Titus, 157 Cal. 673, 110 Pac. 118; Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769; Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254.

4. Ballard v. Titus, 167 Cal. 673, 110 Pac. 118.

5. Ballard v. Titus, 157 Cal. 673, 110 Pac. 118; Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254.

6. Colegrove Water Co. v. Hollywood, 151 Cal. 425, 13 L. R. A. (N. S.) 904, 90 Pac. 1053; Kern Island Irr. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. 1052; Winslow v. Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 7 Ann. Cas. 851, 5 L. R. A. (N. S.) 851, 84 Pac. 191; Vestal v. Young, 147 Cal. 721, 82 Pac. 383; S. C., 147 Cal. 715, 82 Pac. 381; Oliver v. Agasse, 132 Cal. 297, 64 Pac. 401; North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69; McGuire v. Brown, 106 Cal. 660, 30 L. R. A. 384, 39 Pac. 1060; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Allen v. San Jose etc. W. Co., 92 Cal. 138, 15 L. R. A. 93, 28 Pac. 215; Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 67; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769.

7. Oliver v. Agasse, 132 Cal. 297, 64 Pac. 401; Allen v. San Jose etc. Co., 92 Cal. 138, 15 L. R. A. 93, 28 Pac. 215; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769.

8. Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. 167.

9. Vestal v. Young, 147 Cal. 715, 82 Pac. 381; North Fork Water Co.

right of way over one portion of a person's land gives the grantee no right over any other portion, no matter how slight the difference.[10] Similarly, the grant of an easement for use in connection with one tract of land cannot be extended as of right for the benefit of another tract.[11] Therefore, when tenants in common of a tract partition it and one reserves certain servitudes over the land of the other, these servitudes can be charged only against the land covered by the deed of partition and not against land subsequently acquired by the owner of the servient tenement.[12] This rule will not, however, prevent the owner of the easement from making changes in the manner of its use, which are reasonable and within the scope of the grant and are made with due care.[13]

§ 8. Use of and Interference With.—The owner of a servient tenement has the right to make any use or disposition of it as he chooses, which is not inconsistent with the use of an easement upon it.[14] This right includes that of creating any number of easements upon the same land, which, however, must not be such as unreasonably to interfere with the use of the others.[15]

v. Edwards, 121 Cal. 662, 54 Pac. 69; Joseph v. Ager, 108 Cal. 517, 41 Pac. 422; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Galletly v. Bockius, 1 Cal. App. 724, 82 Pac. 1109.

10. Vestal v. Young, 147 Cal. 715, 82 Pac. 381; Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 67.

11. Myers v. Berven, 166 Cal. 484, 137 Pac. 260.

12. Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351.

13. Hargrave v. Cook, 108 Cal. 72, 30 L. R. A. 390, 41 Pac. 18; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769.

14. Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569; Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Lawlor v. Southern Pac. Co., 39 Cal. App. 97, 178 Pac. 165; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900; Galletly v. Bockius, 1 Cal. App. 724, 82 Pac. 1109. This rule applies even to land subject to use as a public road. Colegrove Water Co. v. Hollywood, 151 Cal. 425, 13 L. R. A. (N. S.) 904, 90 Pac. 1053. See also Peterson v. Machado, 5 Cal. Unrep. 273, 43 Pac. 611, where the owner of the land was held entitled to lay pipes beneath a right of way upon offering to make the necessary adjustments to the road.

15. Galletly v. Bockius, 1 Cal. App. 724, 82 Pac. 1109.

On the other hand, the owner of an easement must use it in such a manner as to impose as slight a burden and damage upon the servient tenement as practicable. He has no right to commit a trespass upon the servient tenement, or to exercise the easement after any manner which happens to suit his pleasure.[16] And it has been said that even where the use is within the terms of the grant, if the servient estate is required to suffer unnecessarily great or irreparable injury, a court of equity under such circumstances and in a proper proceeding would perhaps be authorized to make such changes in the manner of the exercise of the right of easement as would afford the owner of the land the full protection and conservation of his estate and his rights therein, at the same time keeping in view and fully protecting the just rights of the owners of the easement.[17] An easement, however, includes what are called "secondary easements," such as the right to enter upon a servient tenement and make repairs, and to do such things as are necessary for the full exercise of the right.[18] Indeed, it is not only the right but the duty of the owner of the easement to keep it in repair.[19] Where a right of way is expressly subject to the right of the owner of the servient tenement to keep and maintain gates upon it, the owner of the easement has the right to open them only for the purpose of passing over the way

16. Tarpey v. Lynch, 155 Cal. 407, 101 Pac. 10; Oliver v. Agasse, 132 Cal. 297, 64 Pac. 401; North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69; Jacob v. Day, 111 Cal. 571, 44 Pac. 243; Joseph v. Ager, 108 Cal. 517, 41 Pac. 422; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Durfie v. Garvey, 78 Cal. 546, 21 Pac. 302; Emerson v. Bergin, 76 Cal. 197, 18 Pac. 264; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198; Ware v. Walker, 70 Cal. 591, 12 Pac. 475; Pico v. Colimas, 32 Cal. 578; Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 67; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769.

17. Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769.

18. Joseph v. Ager, 108 Cal. 517, 41 Pac. 422. And see cases cited supra, this paragraph.

19. Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39 (here the owner of the land used the easement in question himself); Durfee v. Garvey, 78 Cal. 546, 21 Pac. 302; Ware v. Walker, 70 Cal. 591, 12 Pac. 475.

and it is his duty to close and fasten them after passing through.[20]

Section 808 of the Civil Code provides that

"The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant."

§ 9. Transfer of Easement.—Unless expressly excepted,[1] easements which are appurtenant to land pass with a transfer of the land,[2] even where the deed does not expressly purport to convey the "appurtenance."[3] When the owner of land to which a right of way is appurtenant sells or devises it in separate parcels to different persons, each of them acquires a right of way as appurtenant to his particular part of the land,[4] and the code provides that

"In case of partition of the dominant tenement the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement."[5]

20. Mendelson v. McCabe, 144 Cal. 230, 103 Am. St. Rep. 78, 77 Pac. 915.

1. Conaway v. Toogood, 172 Cal. 706, 158 Pac. 200; Rubio Cañon etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811.

2. Civ. Code, §§ 1084, 1104; Conaway v. Toogood, 172 Cal. 706, 158 Pac. 200; Rubio Cañon etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; Corea v. Higuera, 153 Cal. 451, 17 L. R. A. (N. S.) 1018, 95 Pac. 882; Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Jones v. Sanders, 138 Cal. 405, 71 Pac. 506; Currier v. Howes, 103 Cal. 431, 37 Pac. 521; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Farmer v. Ukiah Water Co., 56 Cal. 11; Cave v. Crafts, 53 Cal. 135; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900.

3. Taylor v. Avila, 175 Cal. 203, 165 Pac. 533; Rubio Cañon etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827.

4. Currier v. Howes, 103 Cal. 431, 37 Pac. 521. As to right of owners of parcels into which dominant tenement has been divided, to use a right of way, see note, 8 A. L. R. 1368.

5. Civ. Code, § 807.

Servitudes in gross.—Unlike the rule at common law, it is the rule in California that servitudes in gross are assignable.[6]

§ 10. Transfer of Servient Tenement.—If the grantor of an easement, for a valuable consideration, afterwards unconditionally conveys the servient tenement to another, who takes without notice of the grant or of the use of the easement, and with no knowledge of facts sufficient to put him on inquiry concerning it, he will take the land free from the burden of it.[7] The rule is otherwise, however, if the grantee has notice of the existence of the easement.[8] The recordation of the instrument containing the grant of the easement is sufficient notice within the rule.[9] Aside from this, a purchaser of real property is bound to take notice of all easements or servitudes which are apparent upon an inspection of the property.[10] If at the time of the transfer the easement is in use in such a way that the effects of such use are plainly visible and the purpose obvious to one who examines the premises, the transferee is put on inquiry with regard to it and cannot escape responsibility by buying without examination. He is bound to take notice of that which a reasonably careful inspection of the land would disclose to him.[11] Many authorities declare that the word "apparent," as applied to an easement

6. See ASSIGNMENTS, vol. 3, p. 254.

7. Pollard v. Rebman, 162 Cal. 633, 124 Pac. 235; Barbour v. Pierce, 42 Cal. 657.

8. Pollard v. Rebman, 162 Cal. 633, 124 Pac. 235; Rubio Cañon etc. Co. v. Everett, 154 Cal. 29, 96 Pac. 811; Jones v. Sanders, 138 Cal. 405, 71 Pac. 506; Smith v. Smith, 21 Cal. App. 378, 131 Pac. 890.

9. Pollard v. Rebman, 162 Cal. 633, 124 Pac. 235; Farmer v. Ukiah Water Co., 56 Cal. 11. See RECORDS; VENDOR AND PURCHASER. Record as notice to purchaser, see note in 16 A. L. R. 1013.

10. Henrici v. South Feather Land etc. Co., 177 Cal. 442, 170 Pac. 1135; Rubio Cañon etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879.

11. Service v. Bedros, 180 Cal. 519, 182 Pac. 26; Pollard v. Rebman, 162 Cal. 633, 124 Pac. 235; Rubio Cañon etc. Assn. v. Everett, 154 Cal. 29, 98 Pac. 811; Myers v. Kenyon, 7 Cal. App. 112, 93 Pac. 888.

in this connection, does not necessarily mean visible, but refers to easements used by means of some artificial permanent structure on the servient tenement, such as a pipe, a sewer, or a ditch, as distinguished from those which use the servient tenement in its natural state and at intervals, in the meantime leaving no visible sign of their existence, such as a way or a right of fishery or pasture. But this question seems not to have been decided in California.[12] On the same theory, a purchaser of land is chargeable with notice of an easement over it reserved by a predecessor in title in a deed which is one of the instruments in his chain of title.[13]

§ 11. Severance of Dominant and Servient Estates.— It is a rule of the common law that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains.[14] This rule is embodied in section 1104 of the Civil Code, which provides as follows:

"A transfer of real property . . . creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and

12. Rubio Cañon etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811.

13. Myers v. Berven, 166 Cal. 484, 137 Pac. 260.

14. Palvutzian v. Terkanian, 47 Cal. App. 47, 190 Pac. 503; Holmes v. Nay, 186 Cal. 231, 199 Pac. 325 (holding rule inapplicable to case at bar); Southern Pac. Co. v. Los Angeles Milling Co., 177 Cal. 395, 170 Pac. 829; Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593; Rubio Cañon etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Cave v. Crafts, 53 Cal. 135; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Kallenburg v. Long, 39 Cal. App. 731, 179 Pac. 730; Beem v. Reichman, 36 Cal. App. 258, 171 Pac. 927; Rodemeyer v. Meger, 30 Cal. App. 514, 158 Pac. 1047; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223.

permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."[15]

No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale.[16] Three things are necessary thus to create an easement by implied grant: (1) A separation of the title; (2) before the separation takes place the use which gives rise to the easement must have been so long continued and so obvious as to show that it was intended to be permanent; and (3) the easement must be reasonably necessary to the beneficial enjoyment of the land granted.[17] The easement in question need not, however, be one of those mentioned in section 801 of the Civil Code. If it be a burden obviously cast upon the land at the time of the segregation of the title it remains a burden upon that land in favor of the other parcel.[18] The word "transfer" as used in the section of the Civil Code above quoted is employed in the general rather than the technical sense, and is not limited to conveyances by deed but applies also to other forms of transfer such as devises by will.[19] The

15. Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025; Conaway v. Toogood, 172 Cal. 706, 158 Pac. 200; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593; Tarpley v. Lynch, 155 Cal. 407, 101 Pac. 10; Rubio Cañon etc. Assn. v. Toogood, 154 Cal. 29, 96 Pac. 811; Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624; Jones v. Sanders, 138 Cal. 405, 71 Pac. 506; Cross v. Kitts, 69 Cal. 217, 58 Am. St. Rep. 558, 10 Pac. 409; Beem v. Reichman, 36 Cal. App. 258, 171 Pac. 972; Rodemeyer v. Meger, 30 Cal. App. 514, 158 Pac. 1047; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223.

16. Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Cave v. Crafts, 53 Cal. 135; Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223.

17. Beem v. Reichman, 36 Cal. App. 258, 171 Pac. 972.

18. Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593.

19. Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025, citing 9 R. C. L. 759;

rule has also been held to apply to a transfer made by a trustee under a deed of trust[20] or by a mortgagor who has unconditional authority to sell.[1]

§ 12. Extinguishment Generally.—The code provides for the extinguishment of an easement by any one of several different methods.[2] The first is "by the vesting of the right to the servitude and the right to the servient tenement in the same person."[3] The reason for this rule is contained in section 805 of the Civil Code, which provides that "a servitude thereon cannot be held by the owner of the servient tenement."[4] However, in order that unity of title to two estates should extinguish an existing easement within the meaning of the rule, the ownership of the two estates must be coextensive and equal in validity, quality and all other characteristics.[5]

Again, an easement is extinguished by the destruction of the servient tenement.[6] An easement, in the true sense of the word, is an interest in real estate, and survives the destruction of a part of the servient estate when there is anything remaining upon which the dominant estate may operate. But a right in the nature of "an easement in a building," as it is sometimes called, is extinguished by

Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

20. Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593.

1. Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

2. Civ. Code, § 811. This section applies to public highways. McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393.

3. Civ. Code, § 811, subd. 1; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593 (holding that a deed by the owner of the dominant tenement to the owner of the servient tenement works an extinguishment of the easement); Cavanaugh v. Wholey, 143 Cal. 164, 76 Pac. 979; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091, holding that the easement is extinguished only for the time that the unity of title continues; Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. 167.

4. Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. 167.

5. Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025.

6. Civ. Code, § 811, subd. 2. As to extinguishment of easement by destruction of servient tenement, see 6 Cal. Law Rev. 299.

the destruction of the building, or the part thereof upon which the easement is imposed, so that there is nothing upon which it can operate.[7] This is true even when there is provision in a grant of the right to use a stairway of a building that it "shall be perpetually kept open." Such provision is insufficient to create an interest in the soil, and the right granted will not survive the destruction of the building.[8]

The third method provided by the code for the extinguishment of an easement is "by the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise."[9] This seems to be a recognition and statutory declaration of the settled rule that if the owner of a dominant estate performs acts thereon which permanently prevent his enjoying an easement, or if he authorizes the owner of the servient estate to do such acts, the effect will be to extinguish it.[10] If, however, the owner of an easement licenses another to do an act which affects the enjoyment of the easement, the right to the easement revives with full vigor when the license is revoked.[11]

§ 13. Extinguishment by Nonuser.—Finally, an easement acquired by enjoyment is extinguished "by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment."[12] It is to be

7. Cohen v. Adolph Kutner Co., 177 Cal. 592, 171 Pac. 424; Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974.

8. Muzio v. Erickson, 41 Cal. App. 413, 182 Pac. 974.

9. Civ. Code, § 811, subd. 3.

10. Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

11. Keller v. Oakland, 36 Cal. App. Dec. 133, 201 Pac. 618.

12. Civ. Code, § 811, subd. 4; Garbarino v. Noce, 181 Cal. 125, 6 A. L. R. 1433, 183 Pac. 532; People v. Southern Pac. Co., 172 Cal. 692, 158 Pac. 177; Home Real Estate Co. v. Los Angeles Pac. Co., 163 Cal. 710, 126 Pac. 972; Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690; Strong v. Baldwin, 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178; Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078; Humboldt County v. Van Duzer, 32 Cal. App. Dec. 924, 192 Pac. 192; Roger v. Struven, 44 Cal. App. 528, 186 Pac. 817; Storrow v. Green, 39 Cal. App. 123, 178 Pac. 339; Drake v. Rus-

noted, however, that this method of extinguishment does not apply to easements founded upon a grant. The latter cannot be lost by mere nonuser for any length of time, no matter how great.[13] To have the effect of extinguishing an easement within the rule, three elements must concur—nonuser, intention to abandon, and damage to the owner of the servient estate. The nonuser must be accompanied with the express or implied intention of abandonment and the owner of the servient estate, acting upon the intention of abandonment and the actual nonuser, must have incurred expenses upon his own estate.[14]

When nonuser is evidence of an abandonment, the question is one of intention, depending upon the circumstances. The acts of the owner of the dominant tenement must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement.[15] Accordingly, the cultivation by the owner of the easement of a strip of land expressly reserved as a right of way,[16] or, on the other hand, mere silence on his part while the owner of the fee is building a house upon

sian River Land Co., 10 Cal. App. 654, 103 Pac. 167; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900; Richard v. Hupp, 4 Cal. Unrep. 824, 37 Pac. 920.

13. Parker v. Swett, 63 Cal. Dec. 405, 205 Pac. 1065; Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690; Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Currier v. Howes, 103 Cal. 431, 37 Pac. 521; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351; Storrow v. Green, 39 Cal. App. 123, 178 Pac. 339; City and County of San Francisco v. Main, 23 Cal. App. 86, 137 Pac. 281; Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809; Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900.

14. Smith v. Worn, 93 Cal. 206, 28 Pac. 944 (quoting Tiedeman on Real Property, § 605); Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351. For a complete discussion of the principles of abandonment, see ABANDONMENT, vol. 1, p. 1.

15. People v. Southern Pac. Co., 172 Cal. 692, 158 Pac. 177; Home Real Estate Co. v. Los Angeles Pac. Co., 163 Cal. 710, 126 Pac. 972; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351.

16. Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809.

the strip,[17] have been held not to constitute abandonment. Yet while nonuser of itself does not effect extinguishment, it will if long continued be considered evidence of an intent to abandon.[18] And when the nonuser of the easement is coupled with an actual and physical interference with its exercise and with an adverse possession of the servient tenement for the period prescribed by law, the easement will be extinguished by the bar of the statute of limitations.[19] So also where the acts of the grantee have led other persons to treat the servient estate as free from the servitude, he will not be permitted to resume the easement because he cannot do so without doing injustice to those who have acted upon the appearances of abandonment.[20]

§ 14. Actions—Damages.

"The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto."[1]

Thus, he may bring an action to quiet his title to the easement[2] or for an injunction against the obstruction thereof,[3] or for the abatement of the nuisance consti-

17. Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915.

18. Home Real Estate Co. v. Los Angeles Pac. Co., 163 Cal. 710, 126 Pac. 972; Smith v. Worn, 93 Cal. 206, 28 Pac. 944. See ABANDONMENT, vol. 1, p. 11.

19. Currier v. Howes, 103 Cal 431, 37 Pac. 521; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Parker v. Swett, 40 Cal. App. 68, 180 Pac. 351; San Francisco v. Main, 23 Cal. App. 86, 137 Pac. 281, where the owner of the fee was a municipal corporation. As to loss of easement by adverse possession or nonuser, see notes, 1 A. L. R. 884; 9 A. L. R. 423.

20. Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

1. Civ. Code, § 809; Los Robles Water Co. v. Stoneman, 146 Cal. 203, 79 Pac. 880; Connell v. McGahie, 37 Cal. App. 439, 173 Pac. 1115. As to declaratory judgment as to right to easement, see note, 12 A. L. R. 90.

2. Gazos Creek etc. Co. v. Coburn, 8 Cal. App. 150, 96 Pac. 359. See QUIETING TITLE.

3. Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87; Vestal v. Young, 147 Cal. 715, 82 Pac. 381; Mendelson v. McCabe, 144 Cal. 230, 103 Am. St. Rep. 78, 77 Pac. 915; Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427;

tuted by such obstruction.[4] But ejectment cannot be maintained either by or against the claimant of an easement because that action will not lie to recover possession of an incorporeal right.[5]

In an action based upon the ownership of an easement, an allegation that the plaintiff is the owner of a described right of way or other easement over defendant's land and that such easement is appurtenant to plaintiff's land, is a sufficient statement of the ultimate facts to be established,[6] and such an allegation may be sustained by proof of title acquired in any legal mode, whether by grant or by prescription.[7] In an action to enforce an agreement for the creation of an easement, the plaintiff is not required to allege that the agreement was in writing, it being sufficient to allege that the agreement was made.[8] Where extinguishment by disuse is relied on as a defense, it must be distinctly averred and proved.[9]

The measure of damages for unlawful interference with the enjoyment of an easement is the difference between the value of the claimant's property just before the interference and its value immediately after the obstruction was completed and put in operation.[10] Injuries to the easement occurring prior to the purchase of it by the

Clough v. W. W. Healy Co., 35 Cal. App. Dec. 536, 200 Pac. 378 (holding a court will, in a proper case, award a mandatory injunction for the protection and preservation of an easement); Smith v. Smith, 21 Cal. App. 378, 131 Pac. 890. See INJUNCTION.

4. Hardin v. Sin Claire, 115 Cal. 460, 47 Pac. 363; Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427. See NUISANCE.

5. Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Wood v. Truckee Turnpike Co., 24 Cal. 474. See EJECTMENT.

6. Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025; Corea v. Higuera, 153 Cal. 451, 17 L. R. A. (N. S.) 1018, 95 Pac. 882. See ADVERSE POSSESSION, vol. 1, p. 623, as to mode of pleading prescriptive title.

7. Myers v. Berven, 166 Cal. 484, 137 Pac. 260; Rowe v. Wurster, 33 Cal. App. Dec. 654, 194 Pac. 725.

8. Barnard v. Lloyd, 85 Cal. 131, 24 Pac. 658; Emerson v. Bergin, 76 Cal. 197, 18 Pac. 264.

9. Corea v. Higuera, 153 Cal. 451, 17 L. R. A. (N. S.) 1018, 95 Pac. 882; Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254.

10. Lawlor v. Southern Pac. Co., 39 Cal. App. 97, 178 Pac. 165.

plaintiff[11] and expenditures made by the plaintiff in an effort to secure a substitute for the easement obstructed or impaired are not proper elements of damages. The values involved may in some cases be rental values.[12]

II. RIGHTS OF WAY.

§ 15. In General.—The privilege which one person or particular description of persons may have of passing over the land of another in some particular line is termed a right of way.[13] Technically, a right of way is merely an easement and does not necessarily divest the owner of the fee of the land,[14] although the term is often used indiscriminately to describe either the easement itself or the strip of land that is occupied for the easement.[15] The word "road," on the other hand, as used in our laws, is uniformly applied to open and unobstructed roads unless qualified by some other word like the adjective "private." It is a term of greater significance than the term "way."[16] A right of way may be public or private.

11. Couson v. Wilson, 2 Cal. App. 181, 83 Pac. 262.

12. Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025.

13. Ballard v. Titus, 157 Cal. 673, 110 Pac. 118; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Wood v. Truckee Turnpike Co., 24 Cal. 474.

14. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879 (where the court say that since a right of way is merely an easement, the owner of the fee may have his action for an injury to his residuary interest as fully as he would be entitled to were it all his own); San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542; Wood v. Truckee Turnpike Co., 24 Cal. 474. A direct grant of a "right of way" for a road carries with it only an easement in the land. Parks v. Gates, 186 Cal. 151, 199 Pac. 40; Myers v. Berven, 166 Cal. 484, 137 Pac. 260; Peterson v. Machado, 5 Cal. Unrep. 273, 43 Pac. 611.

15. Anderson v. Willson, 32 Cal. App. Dec. 646, 191 Pac. 1016.

16. Smith v. Worn, 93 Cal. 206, 28 Pac. 944. See, however, Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879, where it is said that "private ways in this country are frequently termed public roads, and are so designated in our statutes"; and Wood v. Truckee Turnpike Co., 24 Cal. 474, where it is said that "road" and "way" are strictly synonymous. See Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577, for discussion of this confusion of terms. As to condemnation of

Public ways as applied to ways by land, are usually termed "highways" or "public roads," and are such ways as every citizen has a right to use.[17] A private way relates to that class of easements in which a particular person or particular description or class of persons have an interest or right as distinguished from the general public. A right of way may arise in California: 1. By prescription,—that is, by an adverse user for five years; 2. By grant; 3. From necessity; 4. By statute.[18] A right of way carries the implied right to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner. Where the width of this mere right of way is expressly specified, the owner may have the absolute right to use to the limits of the specified width even though the result be to give him a wider way than is necessary.[19]

§ 16. Ways Created by Sale of Lot With Reference to Map.—When one lays out a tract of land into lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets shown for ingress and egress and for any use proper to a private way. This private easement is entirely independent of the fact of dedication to public use. It is a private appurtenance to the lots, of which the owners cannot be divested except by due process of law.[20]

"private road" under Pol. Code, § 2692, see EMINENT DOMAIN.

17. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879. As to public ways, see HIGHWAYS.

18. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879.

19. Ballard v. Titus, 157 Cal. 673, 110 Pac. 118.

20. Anderson v. Citizens' etc. Co., 185 Cal. 386, 197 Pac. 113 (stating, however, that the rule may perhaps be otherwise where the street is stated in the deed to have been abandoned); Eltinge v. Santos, 171 Cal. 278, Ann. Cas. 1917A, 1143, 152 Pac. 915; Weller v. Brown, 160 Cal. 515, 117 Pac. 517; Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87; Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690; Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178; Eachus v. Los Angeles etc. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Currier v. Howes, 103

This rule rests upon the doctrine of estoppel.[1] This right is not strictly limited to the use necessary for ingress and egress. It embraces not only the street which abuts upon the particular lot in question and such other streets as may lead therefrom to some public highway or public place, but all the streets shown on the map, and it will be enforced in equity, with respect to all the streets which the particular lot owner has occasion to use.[2] It has been held in other states that no such easement arises where in the particular case in question time has shown that the scheme of subdivision and settlement as a part of a town or village has failed in whole or in part, or where the lots on the closed streets are unoccupied and such lots and interlying streets are used for agriculture or other purposes incompatible with use for dwellings or business and which render such streets useless;[3] but this question remains undecided in California.[4] The same right may arise where there is no map but the streets are marked on the ground and the lots are sold on the representation that such streets exist.[5] It is immaterial in the application of the above rules whether the way in question is called a way or a street, avenue, lane, road, place or

Cal. 431, 37 Pac. 521; Archer v. Salinas, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; Kittle v. Pfeiffer, 22 Cal. 484; Breed v. Cunningham, 2 Cal. 361; Smith v. Smith, 21 Cal. App. 378, 131 Pac. 890; McCarthy Co. v. Moir, 12 Cal. App. 441, 107 Pac. 628; Myers v. Kenyon, 7 Cal. App. 112, 93 Pac. 888. See DEDICATION, ante, p. 1.

1. Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87; Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178; People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; Myers v. Kenyon, 7 Cal. App. 112, 93 Pac. 888.

2. Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87 (noting that there are decisions to the contrary in other states); Archer v. Salinas, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839.

3. Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87, referring to rule in other jurisdictions.

4. Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690.

5. Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87; Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178.

court,[6] or whether the streets indicated have names or numbers,[7] or that the particular street claimed is a mere cul-de-sac,[8] or that by the descriptions the lot in question runs simply to the edge of the street and not to the center.[9] Decisions in other jurisdictions have declared a limitation of the general rule, to the effect that a mere reference to a road or way for purposes of description solely, as any other mark or monument might be referred to, does not operate to convey an easement in such road or way or raise any estoppel on the owner, but this question has never been passed upon in California.[10]

§ 17. Ways of Necessity.—When a grantor conveys land shut off from access to a road into the outer world by the grantor's remaining land, or partly by his land and partly by that of a stranger, a way of necessity arises over the adjoining land of the grantor.[11] Such a way arises by operation of law from the effect of the grant or reservation of the land itself, and can arise only when the relation of grantor and grantee exists between the parties,[12] and when the dominant and servient estates were under the same ownership at the time of the conveyance,[13]

6. Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690, quoting Jones on Easements.

7. Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178.

8. Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690.

9. Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690; Kittle v. Pfeiffer, 22 Cal. 284. See DEDICATION, ante, p. 1.

10. Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690.

11. Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104; Cory v. Santa Ynez Land etc. Co., 151 Cal. 778, 91 Pac. 647; San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687; Barnard v. Lloyd, 85 Cal. 131, 24 Pac. 658; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479 (holding that it was proper to prove by parol that when the claimant received his deed the land lying between that conveyed and the county road was owned by a stranger); Taylor v. Warmaky, 55 Cal. 350; Beem v. Reichman, 36 Cal. App. 258, 171 Pac. 972.

12. Bully Hill etc. Co. v. Bruson, 4 Cal. App. 180, 87 Pac. 237.

13. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Taylor v. Warmaky, 55 Cal. 350; Beem v. Reichman, 36 Cal. App. 258, 171 Pac. 972.

and when a necessity therefor exists.[14] A way of necessity may arise from a decree of partition under which one of the parcels set off in severalty is entirely inclosed by others. The effect of such partition is to convey the interest of the various cotenants in the particular parcels to the allottees of those parcels. Each is therefore a grantor and a grantee, and the one to whom an inclosed piece is set off has the same rights against the others that he would have if they had joined in a voluntary conveyance to him.[15] The principle has also been applied as entitling a grantee under a foreclosure of a mortgage to a way of necessity over a homestead of the mortgagor which was included in the mortgage but not sold thereunder.[16] But the mere fact that all of the land was originally part of the public domain and hence owned by a common grantor cannot confer the peculiar right out of which a way from necessity arises.[17] Finally, the grantor must be the sole owner, and not simply the owner of an undivided interest, in the land over which the right is claimed.[18] The fact that in a particular case the claimant could have a way by condemnation does not affect his right to a way of necessity.[19] And it is immaterial whether the road to which an exit is sought is a county road or a mere by-road, provided it is a road which the claimant is entitled to use.[20]

14. See infra, § 18.

15. Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104 (holding that where the partition decree fails to provide roads, it may be that the location of ways of necessity should be fixed by a subsequent proceeding in which the owners of all of the parcels which might be affected are brought in, and compensation may be provided to be paid to the owners of the parcel burdened with the easement by those who are relieved); Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778. As to way of necessity arising from partition, see 5 Cal. Law Rev. 265.

16. San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687.

17. Bully Hill etc. Co. v. Bruson, 4 Cal. App. 180, 87 Pac. 237.

18. McDonald v. McElroy, 60 Cal. 484. See supra, § 5.

19. Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778.

20. Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479.

§ 18. **Degree of Necessity.**—Although there is some conflict in the authorities as to what constitutes a necessity sufficient to raise an implied grant of a right of way,[1] it has been held in California that such a way cannot exist except in cases of strict necessity; that is to say, it can only be claimed when it furnishes the only way by which access may be had to the property of the claimant. It will not exist where a man can get to his property through his own land, even though that way is too steep or too narrow, or presents other and like difficulties.[2] Even the impassibility of an available road does not create such a right, although it may confer a personal temporary right, in common with the traveling public, to pass over the land because the established road is impassable.[3]

§ 19. **Location and Duration.**—The owner of the land over which a way of necessity is claimed has the primary right to designate the portion of his land over which the way shall pass,[4] but if he neglects to do so, the owner of

1. See Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104, referring to authorities elsewhere. As to way of necessity as affected by common ownership of parcels not accessible from one another, see note in 5 A. L. R. 1557.

2. Cassin v. Cole, 153 Cal. 677, 96 Pac. 277; Corea v. Higuera, 153 Cal. 451, 17 L. R. A. (N. S.) 1018, 95 Pac. 882; Humphreys v. Blasingame, 104 Cal. 40, 37 Pac. 804; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479; Ramirez v. McCormick, 4 Cal. 245; Lapique v. Morrison, 29 Cal. App. 136, 154 Pac. 881; Bully Hill etc. Co. v. Bruson, 4 Cal. App. 180, 87 Pac. 230. See Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104, where the court says that even if it takes the rule to be that the necessity giving rise to the easement must only be a "reasonable necessity," the findings in question did not show such a necessity. See also San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687, admitting evidence as to the most convenient way to reach the highway.

3. Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104; Carey v. Rae, 58 Cal. 159.

4. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879. Therefore a complaint to establish a way of necessity, which sets forth the facts as to the ownership by the different parties, and shows the right to a way of necessity, is not fatally defective for not describing the way; San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687.

the dominant tenement may designate it.[5] In the latter event, the route selected should be a convenient one over the adjoining land of the grantor, due regard being had to the interest of both parties.[6]

A way of necessity is presumed to continue until it is shown that the right no longer exists. It cannot be extinguished as long as the necessity remains, but the necessity ceases when another way is acquired or when by the acquisition of other land the owner can reach the public road without traversing the lands of others.[7]

5. Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879.

6. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879.

7. Cassin v. Cole, 153 Cal. 677, 96 Pac. 277; Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Carey v. Rae, 58 Cal. 159.

(T. T. M.)

EDUCATION.

See SCHOOLS; UNIVERSITIES AND COLLEGES.

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I. INTRODUCTORY.

§ 1. **Scope of Article.**—This article treats of actions at law for the recovery of real property and damages for its withholding. It deals particularly with the essentials to the maintenance of the action, the principal defenses available, the matters of procedure peculiar to this form of action, and the right and method of recovering the mesne profits or damages for the withholding of the land sued for. The effect of the existence of certain special relations among the parties or between the parties and third persons is also discussed.[1] The kindred action of forcible entry and detainer and the equitable action to quiet title are treated in separate articles,[2] as are also the defenses of another action pending, and[3] lis pendens.[4]

§ 2. **Nature, Purpose and Effect.**—Generally speaking, ejectment is a possessory action,[5] having for its object, as far as the form of the recovery alone indicates it, the re-

1. See infra, §§ 43–47.
2. See FORCIBLE ENTRY AND DETAINER; QUIETING TITLE.
3. See ABATEMENT AND REVIVAL, vol. 1, p. 30.
4. See LIS PENDENS.
5. Montgomery v. Santa Ana etc. Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89, 25 L. R. A. 654, 37 Pac. 786; Dimick v. Deringer, 32 Cal. 488; Garner v. Marshall, 9 Cal. 268; Payne v. Treadwell, 5 Cal. 310; Suñol v. Hepburn, 1 Cal. 254; City and County of San Francisco v. Grote, 5 Cal. Unrep. 612, 36 L. R. A. 502, 47 Pac. 938.

covery of the possession of premises which the defendant unlawfully withholds from the plaintiff.[6] The issues are, therefore, the right of possession on the part of the plaintiff and the ouster by the defendant,[7] and the essential facts to be alleged and proved are: that the plaintiff is seised of the premises or of some estate therein, in fee, or for life or for years, and that the defendant was in their possession at the commencement of the action.[8] It is the right to the possession as between the parties that is tried, and that question when ascertained determines how the recovery shall be.[9] The judgment determines no rights but those of present possession,[10] and is conclusive on only two points,—that is, the right of possession in the plaintiff and the wrongful possession of the defendant at the time of the institution of the action.[11] The question of title is often not in issue and in such case is immaterial;[12] in fact, the actual title may be in neither party.[13] In any event, the title remains after judgment precisely

6. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

7. Knight v. Roche, 56 Cal. 15, Porter v. Garrissino, 51 Cal. 559. See §§ 6, 15, infra.

8. McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Haight v. Green, 19 Cal. 113; Payne v. Treadwell, 16 Cal. 220 (form followed in many later cases); Youdall v. Kaufman, 36 Cal. App. Dec. 819, 203 Pac. 448 (adding rents and profits, as to which see infra, § 43). As to form of complaint, see infra, §§ 22–24.

9. Marshall v. Shafter, 32 Cal. 176; Long v. Neville, 29 Cal. 131; Garner v. Marshall, 9 Cal. 268; Payne v. Treadwell, 5 Cal. 310. See infra, § 34. At common law, however, before the abolition of the fictitious demise, the right of possession was not, strictly speaking, the fact litigated and determined. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187. For discussion of the common-law action, see infra, § 3.

10. Hardy v. Johnson, 68 U. S. (1 Wall.) 371, 17 L. Ed. 502, see, also, Rose's U. S. Notes. See infra, § 34.

11. Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190; Murray v. Green, 64 Cal. 363, 28 Pac. 118; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Johnson v. Hancock, 2 Cal. Unrep. 401, 4 Pac. 1093. See infra, §§ 33, 34.

12. Long v. Neville, 29 Cal. 131; Grady v. Early, 18 Cal. 108; Burke v. Table Mountain Water Co., 12 Cal. 403; Garner v. Marshall, 9 Cal. 268.

13. Marshall v. Shafter, 32 Cal. 176. See infra, § 17.

where it was before, and is only brought into the case for the purpose of aiding the court in determining to whom the possession belongs. The judgment transfers the possession to the plaintiff if he shows a better right to it than the defendant, but the plaintiff does not thereby acquire any better or other or different title than he had before; on the contrary, he goes into possession under whatever title he may have previously had. He goes into possession according to his title, and the title and possession unite.[14]

Yet, while the direct result of a recovery is only a restitution of the possession, the action to recover possession of real property is still in effect, like ejectment at common law, an action for the trial of disputed titles. Whether the title exists in presumption or is produced in fact, it is the title that prevails in the action. The court adjudges that the plaintiff is entitled to the possession of the premises when it appears that his title is better than that held by the defendant, by presumption or in fact.[15] Under a general denial each party claims the title and the court determines which of the two holds it,[16] and the party who recovers after a trial on the merits is successful because he has the better title.[17]

§ 3. Historical Development.—Originally, a party who desired to recover the possession of land in an action of ejectment, entered upon the land, and there executed a lease to some friend, and left him in actual possession, where he remained till some other friend (called the casual ejector), or the prior tenant, came and turned him out. For this injury the tenant brought his action against the party who ousted him. If the party ousting him was a stranger, he was bound, under a rule of court, to give notice to the tenant in possession that he had been sued

14. Long v. Neville, 29 Cal. 131.
15. Marshall v. Shafter, 32 Cal. 176.
16. Holmes v. Salamanca etc. Co., 5 Cal. App. 659, 91 Pac. 160. See infra, § 27.
17. Marshall v. Shafter, 32 Cal. 176.

and should make no defense, and that unless the tenant in possession should defend he would be turned out. This served as process to the tenant in possession, who then appeared and defended by permission of the court, and became the real defendant in the suit. The plaintiff did not allege title in his declaration. He simply alleged that his lessor, on a day named, demised to him the premises in question, to hold for a specified term then next ensuing; that by virtue of said demise he entered into said premises and became and was thereof possessed for the said term; that being so possessed the defendant, at a time specified, and before the expiration of his term, with force and arms entered and ejected him. Subsequently a change was made by the courts, after which the plaintiff and casual ejector were fictitious persons.[18] The tenant in possession, as a condition of being allowed to appear and defend, was required to enter into what was called the consent rule, whereby he agreed to confess the lease, entry and ouster, and to plead not guilty. This obviated the necessity of proof on the points admitted, and left the parties at the trial at that stage of the proceedings in which they would have been after proving lease and ouster. The only matter which was tried by the court was whether the plaintiff's lessor had any title to the land.[19] But the form of the declaration continued to be the same.[20]

At the present day, however, the fictions of the action of ejectment at common law have no longer any existence in California.[1] Convenient as was the common-law action under the ancient practice for the determina-

18. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

19. Frazier v. Lynch, 97 Cal. 370, 32 Pac. 319; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

20. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

1. Beard v. Federy, 3 Wall. (U. S.) 478, 18 L. Ed. 88, see, also, Rose's U. S. Notes; Hardy v. Johnson, 1 Wall. (68 U. S.) 371, 17 L. Ed. 502, see, also, Rose's U. S. Notes. In 1855 the question was still undecided. Norris v. Russell, 5 Cal. 249.

tion of title to land, in this state where equity and law are administered in the same forum and under a single pleading, where an action to quiet title or to determine conflicting claims to real estate may be brought indifferently by one in or out of possession, the utility of such an action no longer exists, and its legal fictions, admirable as they were under the common law procedure, serve but as matters of embarrassment under our code procedure, where every action should be prosecuted in the name of the real party in interest.[2] Accordingly the technical allegations necessary in the common-law action have been abolished,[3] and the names of the real contestants must appear in the pleadings.[4]

While it is usual to speak of the action to recover the possession of real property as an action of ejectment, yet technically and substantially there is no action of ejectment in California.[5] The forms and fictions of the action of ejectment are of the very essence and substance of the action, and wherever its forms are swept away, its peculiar incidents and consequences go with them. As a matter of fact, it has been said that there would be just as much propriety in calling the action to recover the possession of land a writ of entry, or an assize, as an ejectment. The pleadings under the present system are more nearly assimilated to the pleadings in a writ of entry, or an assize, than to the pleadings in an action of ejectment.[6] There appears to be a growing tendency to abandon the action entirely in favor of the statutory action to quiet title.[7]

2. Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190, per Henshaw, J.

3. Payne v. Treadwell, 16 Cal. 220; Yount v. Howell, 14 Cal. 465. In many other states, also, the common-law action of ejectment has either been abolished or the proceedings materially modified. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

4. Beard v. Federy, 3 Wall. (U. S.) 478, 18 L. Ed. 88, see, also, Rose's U. S. Notes; Hardy v. Johnson, 1 Wall. (68 U. S.) 371, 17 L. Ed. 502, see, also, Rose's U. S. Notes.

5. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Payne v. Treadwell, 16 Cal. 220.

6. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

7. Donahue v. Meister, 88 Cal.

II. ESSENTIALS TO MAINTENANCE OF ACTION.

§ 4. Property Recoverable—Easements.—Ejectment is intended for the recovery of corporeal hereditaments only, and therefore the right to an easement cannot be tried out in this form of action.[8] In other words, there must be something tangible of which possession can be given.[9] Nevertheless, ejectment may be maintained by a municipal corporation for the recovery of the possession of a street or park wrongfully occupied by an individual, whether the fee is in the corporation or the adjoining proprietor, since by a dedication there passes to the public not merely a right to the use of a street, but also such an interest in the land as is necessary for the enjoyment of that use by the public.[10] Streets and parks belong to the public and the public is entitled to the

121, 22 Am. St. Rep. 283, 25 Pac. 1096. Note the comparatively small number of citations in this article to the later volumes of the reports.

8. Fresno Street R. R. Co. v. Southern Pac. R. R. Co., 135 Cal. 202, 67 Pac. 773; City and County of San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127; Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Mahon v. San Rafael etc. Co., 49 Cal. 269; San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542; Wood v. Truckee Turnpike Co., 24 Cal. 474; City and County of San Francisco v. Grote, 5 Cal. Unrep. 612, 47 Pac. 938, 36 L. R. A. 502; Mahon v. Simms, 1 Cal. Unrep. 872. See EASEMENTS, ante, p. 942.

9. Southern Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032; Frisbie v. McClernin, 38 Cal. 568; City and County of San Francisco v. Grote, 5 Cal. Unrep. 612, 47 Pac. 938, 36 L. R. A. 502.

10. Fresno St. R. R. Co. v. Southern Pac. R. R. Co., 135 Cal. 202, 67 Pac. 773; City and County of San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127, reversing 5 Cal. Unrep. 612, 36 L. R. A. 502, 47 Pac. 938; City of Eureka v. Gates, 120 Cal. 54, 52 Pac. 125; City of Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; City and County of San Francisco v. Sullivan, 50 Cal. 603. Rule applied, City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247. See DEDICATION, vol. 9, p. 1.

If the adjoining proprietor has retained the fee, the right of the municipality to regulate the public use and for that purpose to possess, use and control the property is treated as a legal and not merely an equitable right. City of Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433.

exclusive possession and use of them. The municipality or county, as the case may be, is simply the agent of the public and hence is entitled to bring an action to recover possession in case the public has been ousted.[11] Upon this same theory, namely, that a right of exclusive possession is more than a mere easement, it has been held that a railroad company may bring an action of ejectment to recover possession of a right of way, exclusive possession of which was granted to it for the purpose of constructing and operating its railroad.[12] A legislative grant authorizing the grantee to build a wharf and conveying the right to the use and occupancy of the adjoining land confer such an interest in the land in question as entitled the grantee to maintain ejectment.[13] On the other hand, a riparian owner in front of whose land a wharf has been constructed by another party without authority of law has no title or right to the possession of the bed of the stream and therefore cannot bring ejectment for that part of the wharf below the line of low water, although the state may do so if no question of riparian rights intervenes.[14]

§ 5. Who may Bring Action—Demand for Possession. A landlord may bring an action of ejectment against a tenant when he is entitled to possession,[15] and, on the other hand, a person who is entitled to possession of a piece of property by virtue of a lease may bring eject-

11. Fresno St. R. R. Co. v. Southern Pac. R. R. Co., 135 Cal. 202, 67 Pac. 773. See HIGHWAYS; PARKS AND SQUARES.

12. Fresno St. R. R. Co. v. Southern Pac. R. R. Co., 135 Cal. 202, 67 Pac. 773; Southern Pac. Co. v. Hyatt, 132 Cal. 240, 54 L. R. A. 522, 64 Pac. 272; Southern Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032. See RAILROADS.

13. Frisbie v. McClernin, 38 Cal. 568. See WHARVES. See infra, § 7.

14. Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634. See WHARVES.

15. Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac 190; Joy v. McKay, 70 Cal. 445, 11 Pac. 763; McCarthy v. Yale, 39 Cal. 585; Heywood v. Berkeley etc. Assn., 2 Cal. Unrep. 658, 11 Pac. 246. See LANDLORD AND TENANT. As to actions by third persons against landlord or tenant, see infra, §§ 43, 44.

ment against the owner.[16] A trustee is the real party in interest so far as third persons are concerned, and he may, without joining his beneficiary,[17] bring an action of ejectment against them to recover the property which is the subject of the trust.[18] But inasmuch as he is not entitled to possession as against his beneficiary, he cannot maintain ejectment against the latter.[19] A husband cannot bring ejectment to recover property which is the separate estate of his wife.[20] The board of supervisors of a county has been held entitled to bring an action of ejectment for rooms in the courthouse against the judges of the superior court.[1] The right of an alien to bring ejectment necessarily depends upon his right to hold and inherit real property.[2]

Except in actions between landlord and tenant[3] a demand for possession or notice to quit is not necessary before bringing an action of ejectment.[4]

§ 6. Right of Possession—Termination of Interest.—In order to recover in ejectment the plaintiff must have a present right of possession as against the defendant,[5]—

16. Camarillo v. Fenlon, 49 Cal. 202.

17. Tyler v. Houghton, 25 Cal. 26.

18. Anson v. Townsend, 73 Cal. 415, 15 Pac. 49 (citing Walker v. McCusker, 71 Cal. 594, 12 Pac. 723); O'Connell v. Dougherty, 32 Cal. 458; Seaward v. Malotte, 15 Cal. 304. See PARTIES; TRUSTS.

19. Tyler v. Granger, 48 Cal. 259.

20. Swain v. Duane, 48 Cal. 358. See HUSBAND AND WIFE.

1. County of San Joaquin v. Budd, 96 Cal. 47, 30 Pac. 967.

2. Lick v. Stockdale, 18 Cal. 219; Siemssen v. Bofer, 6 Cal. 250. See ALIENS, vol. 1, pp. 927–930.

3. See LANDLORD AND TENANT.

4. San Joaquin County v. Budd, 96 Cal. 47, 30 Pac. 967; McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; Joy v. McKay, 70 Cal. 445, 11 Pac. 763; McMinn v. Mayes, 4 Cal. 209; Gladwin v. Stebbins, 2 Cal. 103; Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Webb v. Winter, 6 Cal. Unrep. 768, 65 Pac. 1028; reversed on another point, 135 Cal. 455, 67 Pac. 691.

5. Montgomery v. Santa Ana etc. Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89, 25 L. R. A. 654, 37 Pac. 786; Chester v. Field, 87 Cal. 422, 25 Pac. 493; Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245; Willis v. Wozencraft, 22 Cal. 607; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Billings v. Pearson, 7 Cal. Unrep. 271, 86 Pac.

a right of possession existing at the time of the commencement of the action.[6] For this reason a deed to the plaintiff executed after the commencement of the action is inadmissible in evidence in an ejectment suit.[7] The plaintiff must also show a right of possession at the time of the trial.[8] Accordingly, a deed to the defendant dated subsequent to the commencement of the action is admissible to defeat a judgment for possession.[9] This rule, however, does not prevent a party to whom the plaintiff transfers property pending the action from having himself substituted for the original plaintiff and continuing the action in the latter's name,[10] or in his own name,[11] or from continuing the action for his own benefit without substitution.[12] In order to prevent a recovery of posses-

825; San Francisco v. Grote, 5 Cal. Unrep. 612, 36 L. R. A. 502, 47 Pac. 938; Billings v. Pearson, 7 Cal. Unrep. 271, 86 Pac. 825.

6. Sauer v. Meyer, 87 Cal. 34, 25 Pac. 153; Porter v. Woodward, 57 Cal. 535; Sacramento Savings Bank v. Hynes, 50 Cal. 195; Meeks v. Kirby, 47 Cal. 168; Cranmer v. Porter, 41 Cal. 462; Hestres v. Brennan, 37 Cal. 385; Page v. O'Brien, 36 Cal. 559; Kile v. Tubbs, 32 Cal. 332; Owen v. Fowler, 24 Cal. 192; Moore v. Tice, 22 Cal. 513; Stark v. Barrett, 15 Cal. 361; Smith v. Billett, 15 Cal. 23; Yount v. Howell, 14 Cal. 465; Sheldon v. Murray, 1 Cal. Unrep. 891; Slaughter v. Fowler, 1 Cal. Unrep. 850; Kerr v. Snowden, 24 Cal. App. 152, 140 Pac. 704; Merryman v. Kirby, 13 Cal. App. 344, 109 Pac. 635.

7. Sacramento Sav. Bank v. Hynes, 50 Cal. 195; Hestres v. Brennan, 37 Cal. 385; Smith v. Billett, 15 Cal. 23, holding, however, that such testimony must be objected to at the trial, and cannot be objected to for the first time upon appeal. See APPEAL AND ERROR, vol. 2, p. 263; TRIAL. See also Sacramento Sav. Bank v. Hynes, 50 Cal. 195, where the point was not raised because there was another source of title.

8. Meeks v. Kirby, 47 Cal. 168; Kile v. Tubbs, 32 Cal. 332.

9. Roper v. McFadden, 48 Cal. 346; Tustin v. Faught, 23 Cal. 237; Moore v. Tice, 22 Cal. 513.

10. Code Civ. Proc., § 385; Moss v. Shear, 30 Cal. 467. See PARTIES. Unless he is substituted, however, he cannot enforce the judgment in his own name. Board of Education v. Thorpe, 1 Cal. Unrep. 254. But he may, in a subsequent action rely upon the recovery in the first action together with averments connecting himself with the title therein. Murray v. Green, 2 Cal. Unrep. 62.

11. Northern Ry. Co. v. Jordan, 87 Cal. 23, 25 Pac. 273 (holding, however, that in such case he should file a supplemental complaint properly stating the facts).

12. Camarilla v. Fenlon, 49 Cal. 202.

sion on the ground that the plaintiff's right thereto has ceased pending the action, the defendant must set out this fact in a supplemental answer,[13] alleging, for instance, the execution of a deed from the plaintiff to the defendant subsequent to the commencement of the suit.[14] In fact, any title acquired by the defendant subsequent to the joinder of issue must be set up by a supplemental answer in the nature of a plea puis darrein continuance,[15] or the defendant will be estopped by the judgment from asserting it in any subsequent action.[16]

On the other hand, the fact that the plaintiff's interest has terminated pending the action does not necessarily defeat his entire action,[17] since it is specifically provided in the code that

"In an action for the recovery of property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the evidence, and the plaintiff may recover damages for withholding the property."[18]

§ 7. **Title to Support Action.**—To establish his right of present possession, the plaintiff in an action to recover real property must show either title or prior possession.[19]

13. Kirsch v. Brigard, 63 Cal. 319; Foscalina v. Doyle, 47 Cal. 437; Hestres v. Brennan, 37 Cal. 385; Baird v. Duane, 1 Cal. Unrep. 492.

14. Roper v. McFadden, 48 Cal. 346; Thompson v. McKay, 41 Cal. 221; Reily v. Lancaster, 39 Cal. 354; Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Moss v. Shear, 30 Cal. 467; McMinn v. O'Connor, 27 Cal. 228. Contra, Marshall v. Shafter, 32 Cal. 176. See as to abatement by transfer of interest, ABATEMENT AND REVIVAL, vol. 1, p. 49.

15. Hardy v. Johnson, 1 Wall. (68 U. S.) 371, 17 L. Ed. 502, see, also, Rose's U. S. Notes.

16. People's Sav. Bank v. Hodgdon, 64 Cal. 95, 27 Pac. 938; Valentine v. Mahoney, 37 Cal. 389.

17. Kirsch v. Brigard, 63 Cal. 319; Clink v. Thurston, 47 Cal. 21; Barstow v. Newman, 34 Cal. 90.

18. Code Civ. Proc., § 740 (based on Practice Act, § 256); Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12; Moss v. Shear, 30 Cal. 467; McMinn v. O'Connor, 27 Cal. 238; Moore v. Tice, 22 Cal. 513; Gee v. Moore, 14 Cal. 472.

19. Cranmer v. Porter, 41 Cal. 462; Page v. O'Brien, 36 Cal. 559; Mar-

And if neither the plaintiff nor his grantors have ever been in possession, it is obvious that he must rely upon a strict title.[20] In that event, it is incumbent upon the plaintiff to prove a proper conveyance from a party having title or from a party in peaceable possession claiming title at the time the conveyance was executed, in which case possession is prima facie evidence of title.[1] The title relied upon must, however, be a legal, and not merely an equitable, title;[2] since it is a settled rule that the holder of a mere equitable title cannot bring an action of this kind as against one having the legal title.[3]

Each of the following muniments of title has been held sufficient as a basis for an action of ejectment: a quitclaim deed from one who could have maintained the action;[4] a certificate of purchase from the state;[5] and a receiver's receipt for land pre-empted in a government

shall v. Shafter, 32 Cal. 176; Pennsylvania Min. Co. v. Owens & Co., 15 Cal. 135; Wilson v. Corbier, 13 Cal. 166; Steinback v. Fitzpatrick, 12 Cal. 295; Suñol v. Hepburn, 1 Cal. 254; Hoffman v. Felt, 1 Cal. Unrep. 369. See infra, § 8. As to title by adverse possession as a basis for ejectment, see ADVERSE POSSESSION, vol. 1, p. 616.

20. Welch v. Sullivan, 8 Cal. 511.

1. Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099 (quoting Tyler on Ejectment).

2. Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Conlan v. Quimby, 51 Cal. 412; Buhne v. Chism, 48 Cal. 467; Thompson v. McKay, 41 Cal. 221; Emeric v. Penniman, 26 Cal. 119; Willis v. Wozencraft, 22 Cal. 607; Brown v. Winter, 14 Cal. 31; Kerr v. Snowden, 24 Cal. App. 152, 140 Pac. 704.

3. San Felipe Mining Co. v. Belshaw, 49 Cal. 655; Felger v. Coward, 35 Cal. 650. See Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820, referring to the cases cited supra, this note, and stating that the action of ejectment referred to was the technical action of ejectment known to the common law, or an action solely for the recovery of the possession of real property based on the simple allegation of ownership or right of possession, and do not apply to cases where a court of equity upon a sufficient statement of facts showing an equitable title and right of possession is asked to give plaintiff relief of an equitable character, and at the same time to let him into possession, or adjudicate the ownership of the premises.

4. Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867; Lawrence v. Ballou, 37 Cal. 518; Carpentier v. Williamson, 25 Cal. 154; Downer v. Smith, 24 Cal. 114; Sullivan v. Davis, 4 Cal. 291. See DEEDS, ante, p. 84.

5. Patterson, J., dissenting in Cucamonga etc. Co. v. Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359;

land office.[6] An actual patent from the state, if it appears to be valid on its face and conveys land subject to disposition by the state, is not only adequate to support the action but is conclusive evidence of title against a party who shows no connection with the common or paramount source of title, but has merely a subsequently acquired title.[7] But an inchoate or incomplete title under a Mexican grant is not a sufficient basis for an action of ejectment.[8]

Title subject to easement.—The Civil Code provides that

"The owner in fee of a servient tenement may maintain an action for the possession of the land, against anyone unlawfully possessed thereof, though a servitude exists thereon in favor of the public."[9]

Accordingly, ejectment can be maintained by the owner of the title to a street dedicated to the public use, against an intruder,[10] as, for example, against a person who con-

Laugenour v. Hennagin, 59 Cal. 625; Young v. Shinn, 48 Cal. 26; Toland v. Mandell, 38 Cal. 30. Such a receipt is prima facie evidence of title, Code Civ. Proc., § 1925. See PUBLIC LANDS.

6. Sacre v. Chalupnik, 63 Cal. Dec. 341, 205 Pac. 449; Thompson v. Basler, 148 Cal. 646, 113 Am. St. Rep. 321, 84 Pac. 161; Graves v. Hebbron, 125 Cal. 400, 58 Pac. 12; Witcher v. Conklin, 84 Cal. 499, 24 Pac. 302; McDonald v. Edmonds, 44 Cal. 328. See PUBLIC LANDS.

7. Wright v. Roseberry, 63 Cal. 252 (holding rule inapplicable to swamp-lands until certified over to the state); Kentfield v. Hayes, 57 Cal. 409; O'Connor v. Frasher, 56 Cal. 499; Doll v. Meador, 16 Cal. 295. See PUBLIC LANDS.

8. Gunn v. Bates, 6 Cal. 263; Leese v. Clarke, 3 Cal. 17. See PUBLIC LANDS.

9. Civ. Code, § 810.

10. City and County of San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127, reversing 5 Cal. Unrep. 612, 36 L. R. A. 502, 47 Pac. 938; Montgomery v. Santa Ana etc. Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89, 25 L. R. A. 654, 37 Pac. 786; Finch v. Riverside etc. Ry. Co., 87 Cal. 597, 25 Pac. 765; Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202, 10 Pac. 510; Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634; Mahon v. San Rafael etc. Co., 49 Cal. 269; Porter v. Pacific Coast R. Co. (Cal.), 18 Pac. 428. A fortiori when there is no legal dedication. Mahon v. Simms, 1 Cal. Unrep. 872. Rule applied, Eureka v. Fay, 107 Cal. 166, 40 Pac. 235;

structs a railroad track thereon without permission from the municipal authorities.[11] Such an action cannot be maintained, however, against a person exercising merely an easement in the street, conferred by the public authorities in pursuance of their power.[12]

§ 8. Prior Possession in General.—It is a firmly established rule that prior possession on the part of the plaintiff or those under whom he claims is sufficient to maintain ejectment as against a naked trespasser or intruder.[13] In other words, if neither claimant relies upon a paper title, prior actual possession is sufficient to support the action.[14] The rule is based upon the general principle that possession is prima facie evidence of title.[15] Even a

City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085. See DEDICATION, ante, p. 1.

11. Montgomery v. Santa Ana etc. Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89, 25 L. R. A. 654, 37 Pac. 786; Finch v. Riverside etc. Ry. Co., 87 Cal. 597, 25 Pac. 765; Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202, 10 Pac. 510.

12. Montgomery v. Santa Ana etc. Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89, 25 L. R. A. 654, 37 Pac. 786.

13. Hart v. Cox, 171 Cal. 364, 153 Pac. 391; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18; Shanahan v. Tomlinson, 103 Cal. 89, 36 Pac. 1009; Kirsch v. Brigard, 63 Cal. 319; Fletcher v. Mower, 56 Cal. 421; Morenhaut v. Wilson, 52 Cal. 263 (where property involved was a mine); Foscalina v. Doyle, 47 Cal. 437; Pierce v. Stuart, 45 Cal. 280; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Hubbard v. Barry, 21 Cal. 321; Nagle v. Macy, 9 Cal. 426; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; McMinn v. Mayes, 4 Cal. 209; Potter v. Knowles, 5 Cal. 87; Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599; Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578; Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Woodworth v. Fulton, 1 Cal. 295 (question not decided); Stephens v. Hambleton, 5 Cal. Unrep. 543, 47 Pac. 51; Rathbun v. Alexander, 1 Cal. Unrep. 664. Rule applied, McKay v. Petaluma Lodge, 1 Cal. Unrep. 278.

14. Hart v. Cox, 171 Cal. 364, 153 Pac. 391; Smith v. Hicks, 139 Cal. 217, 73 Pac. 144 ("prior peaceable possession"); Bradley v. Lee, 38 Cal. 362 (dissenting opinion of Sprague, J.); Hawxhurst v. Lander, 28 Cal. 331; Carleton v. Townsend, 28 Cal. 219; Hubbard v. Barry, 21 Cal. 321; Coryell v. Cain, 16 Cal. 567; Nagle v. Macy, 9 Cal. 426; Potter v. Knowles, 5 Cal. 87; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692.

15. Davis v. Crump, 162 Cal. 513, 123 Pac. 294; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18;

mere possession as an entryman under the homestead laws of the United States is sufficient for this purpose.[16] A fortiori, possession coupled with color of title must prevail except where a better title is shown in the other party,[17] and a later colorable title is not a sufficient defense.[18] Accordingly, the complaint need not allege title if it alleges prior possession,[19] and even if title is alleged, the plaintiff need only prove prior possession.[20] To constitute a mere trespasser or intruder under the rule the defendant must be one without either title or color of title. Therefore the rule has been held not to apply in an action against a person entering upon mining land for the purpose of mining,[1] or a person who has made a valid homestead entry under the laws of the United States and paid what is required.[2] A judgment-roll in a prior action of ejectment is admissible on the question of prior possession.[3]

Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Estrada v. Murphy, 19 Cal. 248; Nagle v. Macy, 9 Cal. 426; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Sacramento Valley R. R. Co. v. Moffatt, 7 Cal. 577; Murphy v. Wallingford, 6 Cal. 648; Potter v. Knowles, 5 Cal. 87; Castro v. Gill, 5 Cal. 40; Bequette v. Caulfield, 4 Cal. 278, 60 Am. Dec. 615; Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597; Hicks v. Davis, 4 Cal. 67; Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578.

16. Fuller v. Fuller, 176 Cal. 637, 169 Pac. 369. See PUBLIC LANDS. The fact that the plaintiff has already pre-empted the maximum amount of public land allowed does not affect the operation of the rule. Slaughter v. Fowler, 44 Cal. 195.

17. Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597; Brown v. O'Connor, 1 Cal. 419.

18. Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Norris v. Russell, 5 Cal. 249.

19. Norris v. Russell, 5 Cal. 249; Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578. As to essentials of complaint, see infra, § 22.

20. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Morton v. Folger, 15 Cal. 275; Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597.

1. Smith v. Doe, 15 Cal. 100.

2. Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705.

3. Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; McCourtney v. Fortune, 57 Cal. 617.

§ 9. **Essentials of Possession.**—The prior possession of land, to enable one to maintain an action of ejectment, must be actual,[4] and exclusive of that of all other persons,[5] and it must be open, notorious and unequivocal so as to notify the public that the land has been appropriated.[6] The difficulty attending the attempt to define possession of lands, or to lay down precise rules by which the sufficiency of a given state of facts to constitute possession may be determined, has often been experienced and admitted by courts of the highest standing, and indeed none but very general rules can be laid down, leaving each case to depend mainly on its own circumstances.[7] It has been said that the possession required to maintain ejectment in the absence of documentary evidence does not go to the extent demanded in order to ripen an adverse possession into legal title,[8] but a very slight examination of the decisions reveals the fact that the courts have habitually applied the principles laid down in either one of the classes of cases to controversies of the other type. Indeed, it has been said that there is no distinction between the actual possession required in case of prior possession and that demanded in adverse possession, so that when actual possession is shown in support of a claim to prior possession, it will support a claim to adverse possession if it be also proved that the claim of title was in hostility to the true owner.[9] The possession need not be personal,

4. See infra, § 10.

5. Hart v. Cox, 171 Cal. 364, 153 Pac. 391; Sheldon v. Mull, 67 Cal. 299, 7 Pac. 710; Walsh v. Hill, 41 Cal. 571; Page v. O'Brien, 36 Cal. 559.

6. Brumagim v. Bradshaw, 39 Cal. 24.

7. Polack v. McGrath, 32 Cal. 15.

8. Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099; Curley, C. J., and Sawyer, J., dissenting in Polack v. McGrath, 32 Cal. 15.

9. Polack v. McGrath, 32 Cal. 15. For requisites of adverse possession, see ADVERSE POSSESSION, vol. 1, pp. 527–535. For essentials of possession in actions of forcible entry and detainer, see FORCIBLE ENTRY AND DETAINER.

however, but may be by means of a tenant,[10] or a mere servant or employee.[11]

§ 10. Actual Possession.—The possession to enable one to maintain ejectment must be actual,[12] that is, a bona fide occupation, a possessio pedis, a subjection to the will and control, as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership,[13] such as recording deeds, paying taxes and the like.[14] Possession is usually evidenced by occupation, substantial inclosure and cultivation or other appropriate use.[15] A mere intention to occupy land, however openly proclaimed, is not possession, unless carried into actual execution by such open, unequivocal and notorious acts of dominion as plainly indicate to the public that the person who performs them has appropriated the land and claims the exclusive dominion over it.[16] So also the mere taking of

10. Easton v. O'Reilly, 63 Cal. 305; Barstow v. Newman, 34 Cal. 90; Hawkins v. Reichert, 28 Cal. 534; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Moor v. Moore, 4 Cal. Unrep. 190, 34 Pac. 90.

11. Dodge v. Yates, 76 Cal. 251, 18 Pac. 323; Polack v. Mansfield, 44 Cal. 36, 13 Am. Rep. 151; Donahue v. Gallavan, 43 Cal. 573; Hawkins v. Reichert, 28 Cal. 534.

12. Foot v. Murphy, 72 Cal. 104, 13 Pac. 163; Polack v. McGrath, 32 Cal. 15; Coryell v. Cain, 16 Cal. 567.

13. Hart v. Cox, 171 Cal. 364, 153 Pac. 391; Brumagim v. Bradshaw, 39 Cal. 24; Page v. O'Brien, 36 Cal. 559; Polack v. McGrath, 32 Cal. 16; Lawrence v. Fulton, 19 Cal. 683 (holding that "possession" and "occupation" are synonymous); Murphy v. Wallingford, 6 Cal. 648; Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599; Woodworth v. Fulton, 1 Cal. 295.

14. Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599. Payment of taxes is not even admissible as evidence of possession. Davis v. Perley, 30 Cal. 630.

15. Lantz v. Cole, 172 Cal. 245, 156 Pac. 45 (holding, however, that cultivation is not necessary); Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913; Slaughter v. Fowler, 44 Cal. 195; Brumagim v. Bradshaw, 39 Cal. 24; Coryell v. Cain, 16 Cal. 567, As to inclosure, see infra, § 12.

16. Brumagim v. Bradshaw, 39 Cal. 24. The intention may, however, be material in determining the sufficiency of the acts proved to constitute possession. Hutton v. Schumaker, 21 Cal. 453.

herbage from land[17] or the grazing of cattle thereon,[18] or a mere entry without color of title, accompanied by a survey and marking lines of boundary, but without an actual inclosure of the premises,[19] is not sufficient to constitute possession. And even the act of employing men to build a small wooden shanty has been held insufficient, where they were driven off and the shanty torn down.[20] But taking and selling gravel from the parts of a tract suitable therefor, selling timber and logs from the parts upon which such things were lodged by winter floods, renting a river bar on an adjacent river for fishing purposes, have been held pertinent to the question of actual possession.[1]

§ 11. Appropriateness of Acts to Character of Land.— The acts of dominion which may be sufficient to constitute an actual possession must be adapted to the particular land, its condition, locality and appropriate use.[2] The philosophy of the rule is that by such acts the party proclaims to the public that he asserts an exclusive ownership over the land and the acts which he performs are in harmony with his claim of title. Hence they must be such as to give notice to the public.[3] Neither actual occupation, cultivation nor residence is necessary to constitute actual possession when the land is so situated as not to admit of any permanent improvement. Acts of dominion over a town lot which would be sufficient to establish an actual possession might be wholly

17. Garrison v. Sampson, 15 Cal. 93; Steinback v. Fitzpatrick, 12 Cal. 295.

18. Suñol v. Hepburn, 1 Cal. 254; Slaughter v. Fowler, 1 Cal. Unrep. 850.

19. Bird v. Dennison, 7 Cal. 297; Murphy v. Wallingford, 6 Cal. 648.

20. Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

1. Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913.

2. Hart v. Cox, 171 Cal. 364, 153 Pac. 391; Smith v. Hicks, 139 Cal. 217, 73 Pac. 144; Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913; Foot v. Murphy, 72 Cal. 104, 13 Pac. 163; Brumagim v. Bradshaw, 39 Cal. 24; Coryell v. Cain, 16 Cal. 567; Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599.

3. Brumagim v. Bradshaw, 39 Cal. 24.

inadequate to that end as applied to a tract of a thousand acres. The herding of cattle on a tract of one hundred acres suitable only for that purpose and accompanied by a claim of title might, under certain circumstances, establish possession of it, while the pasturing of cattle on a town lot suitable only for building purposes would be wholly insufficient.[4] For the purpose of determining what use is appropriate in a given instance, the manner in which owners of land of like character in the same neighborhood commonly use and occupy similar land may be considered and may be proved.[5] But the acts and intentions of the possessor are not to be measured according to the work done on any fragment or portion of the land; they must be viewed with reference to his general plan for improving the entire tract.[6]

§ 12. Inclosure.—A substantial inclosure[7] sufficient to turn cattle[8] is the most common and generally accepted evidence of possession of land, especially when the inclosure is accompanied by actual pasturage of cattle.[9] The fence or other means of inclosure need not be so high, strong and close as to preclude the possibility of its being broken, but it should be of such strength as a prudent farmer erects to protect his growing crops. An inclosure that falls short of this serves no other purpose than to

4. Brumagim v. Bradshaw, 39 Cal. 24.

5. Hart v. Cox, 171 Cal. 364, 153 Pac. 391; Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913.

6. Hart v. Cox. 171 Cal. 364, 153 Pac. 391.

7. Kirsch v. Brigard, 63 Cal. 319; Borel v. Rollins, 30 Cal. 408; Gruell v. Spooner, 71 Cal. 493, 12 Pac. 511, holds that building a house on a tract of land and inclosing all of it except a small portion where the adverse party's house stands is sufficient.

8. Smith v. Hicks, 139 Cal. 217, 73 Pac. 144; Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913; Slaughter v. Fowler, 44 Cal. 195; Brumagim v. Bradshaw, 39 Cal. 24; Polack v. McGrath, 32 Cal. 15; Baldwin v. Simpson, 12 Cal. 560.

9. Smith v. Hicks, 139 Cal. 217, 73 Pac. 144; Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705; Southmayd v. Henley, 45 Cal. 101; Slaughter v. Fowler, 44 Cal. 195; Brumagim v. Bradshaw, 39 Cal. 24.

mark the lines of the tract and is of no greater consequence or value in proving actual possession than are the corner posts or blazed line trees.[10] The inclosure may be formed, however, partly by artificial and partly by natural barriers,[11] as for instance, the ocean, a bay or a deep river, a precipitous cliff,[12] or a marsh.[13] Each case depends upon its own peculiar circumstances. The barrier, however, must correspond in a reasonable degree with the size of the tract, its condition and appropriate use, and must be such as usually accompany the ownership of land similarly situated.[14] In the case of an island, the amount of inclosure, if any, and the acts of ownership which are necessary vary with the size and location of the island.[15] And in case of a small peninsula of a few acres, a fence or impassable ditch across its neck is adequate to complete the inclosure.[16] The fact that part of a neighbor's land is included within the inclosure by permission is immaterial.[17] And it is likewise immaterial that the claimant does not fence the land in question on the side on which he has other land,[18] or that he and the owner of an adjoining tract by mutual consent inclose the two tracts together by a fence around the exterior boundaries of both.[19]

10. Polack v. McGrath, 32 Cal. 15. Proof of use of property for a number of years for purposes requiring an inclosure and the fact of an inclosure is sufficient to show the substantial nature of it. Hestres v. Brannan, 21 Cal. 423. But a brush fence two or three feet high has been held not sufficient. Hutton v. Schumaker, 21 Cal. 453. See also ADVERSE POSSESSION, vol. 1, pp. 530, 533.

11. Smith v. Hicks, 139 Cal. 217, 73 Pac. 144; Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705; Brumagim v. Bradshaw, 39 Cal. 24.

12. Brumagim v. Bradshaw, 39 Cal. 24.

13. Smith v. Hicks, 139 Cal. 217, 73 Pac. 144; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705; Brumagim v. Bradshaw, 39 Cal. 24.

14. Brumagim v. Bradshaw, 39 Cal. 24.

15. Brumagim v. Bradshaw, 39 Cal. 24.

16. Brumagim v. Bradshaw, 39 Cal 24; Castro v. Gill, 5 Cal. 40; Hicks v. Davis, 4 Cal. 67.

17. Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

18. Foot v. Murphy, 72 Cal. 104, 13 Pac. 163.

19. Smith v. Hicks, 139 Cal. 217,

Actual possession may even exist without any inclosure whatever. The inclosure of land is evidence of possession, but not the only evidence thereof.[20] One who enters upon and occupies land, subjects it to his dominion for a purpose for which it is adapted and excludes all others therefrom is as much in possession of it as if he had inclosed it with a fence.[1]

§ 13. Possession of Portion Under Color of Title to Whole.—One who enters in good faith into actual possession of a portion of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited as to his possession to the amount actually occupied, but acquires constructive possession of the entire tract, if not in any adverse possession,[2] and therefore in such case, as to the portions lying beyond the actual occupation, neither title nor prior possession need be proved.[3] In other words, if one comes as a mere intruder he is limited to his actual possession; if he comes with color of title he is allowed to recover to the extent of his metes and bounds.[4] The entry must be made ac-

73 Pac. 144; Reay v. Butler, 95 Cal. 206, 30 Pac. 208 (holding the rule applicable to public as well as private lands).

20. Hart v. Cox, 171 Cal. 364, 153 Pac. 391; Smith v. Hicks, 139 Cal. 217, 73 Pac. 144; Sheldon v. Mull, 67 Cal. 299, 7 Pac. 710; Brumagim v. Bradshaw, 39 Cal. 24 (a quarry or a mine might not need to be inclosed); Daubenbiss v. White, 3 Cal. Unrep. 590, 31 Pac. 360.

1. Sheldon v. Mull, 67 Cal. 299, 7 Pac. 710. Cited in Foot v. Murphy, 72 Cal. 104, 13 Pac. 163.

2. Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Neubaumer v. Woodman, 89 Cal. 310, 26 Pac. 900; Dodge v. Yates, 76 Cal. 251, 18 Pac. 323; Donahue v. Gallavan, 43 Cal. 573; Cannon v. Union Lumber Co., 38 Cal. 672; Walsh v. Hill, 38 Cal. 481 (pointing out that the land must, of course, not be in the adverse possession of another at the time of the entry); Ayres v. Bensley, 32 Cal. 620; McKee v. Greene, 31 Cal. 418; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103. (This case and the preceding hold that the rule is the same as that in regard to adverse possession. See vol. 1, p. 581, note 19); Baldwin v. Simpson, 12 Cal. 560. For similar rule in connection with adverse possession, see ADVERSE POSSESSION, vol. 1, p. 581.

3. Dodge v. Yates, 76 Cal. 251, 18 Pac. 323; Walsh v. Hill, 38 Cal. 481.

4. Walsh v. Hill, 38 Cal. 481; Suñol v. Hepburn, 1 Cal. 254.

tually under the deed and be founded upon it in good faith,[5] and therefore the rule does not apply if the land conveyed is known to the claimant to be land to which the grantor had no title or color of title.[6] Nor does it apply beyond the boundaries specified in a lease if the claimant's only possession is by means of a tenant under a lease containing specific boundaries.[7] The rule is not limited to tracts of customary size, such as are ordinarily occupied as farms usually cultivated.[8] As indicated by the rule, color of title is indispensable to such constructive possession; and the mere possession of a part of a tract of land marked by distinct boundaries, by a person claiming the whole, is not sufficient without such color to draw after it the possession of the whole tract.[9]

§ 14. Ouster and Withholding.—Generally speaking, the plaintiff in ejectment must allege and prove an ouster by the defendant or his grantor,[10] before the commencement of the action[11] and a continued withholding of the property from the plaintiff at the time of the commencement of the action.[12] It has frequently been said that the withholding of possession is the gravamen of the action of ejectment.[13] The means employed to oust the plaintiff

5. Cannon v. Union Lumber Co., 38 Cal. 672.

6. Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Crockett, J., in Cannon v. Union Lumber Co., 38 Cal. 672.

7. Walsh v. Hill, 38 Cal. 481.

8. Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103. Contra, Gunn v. Bates, 6 Cal. 263.

9. Polack v. McGrath, 32 Cal. 15, overruling Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599; Garrison v. Sampson, 15 Cal. 93; Suñol v. Hepburn, 1 Cal. 254 (Mexican and common law). See ADVERSE POSSESSION. vol. 1, p. 582.

10. McKinley v. Tuttle, 42 Cal. 570; Watson v. Zimmerman, 6 Cal. 46; Billings v. Pearson, 7 Cal. Unrep. 271, 86 Pac. 825. Rule applied, Montgomery v. Santa Ana etc. Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89, 25 L. R. A. 654, 37 Pac. 786; Scott v. Rhodes, 5 Cal. Unrep. 131, 41 Pac. 878.

11. Sacre v. Chalupnik, 63 Cal. Dec. 341, 205 Pac. 449.

12. Hawkins v. Reichert, 28 Cal. 534.

13. Johnson v. Vance, 86 Cal. 128, 24 Pac. 863; Ewald v. Corbett, 32 Cal. 473; Ayres v. Bensley, 32 Cal. 620; Marshall v. Shafter, 32 Cal. 176; Donner v. Palmer, 1 Cal. Unrep. 392.

are immaterial, the question being whether the defendant's possession is wrongful or not. The wrongful entry may be effected through force or fraud.[14] And an ouster may be proved by evidence showing an entry by defendant as a tenant and a subsequent holding of the property under a claim in contravention of the tenancy,[15] or a holding over after the termination of the lease.[16] The ouster may be committed by an agent or employee,[17] and under the principles of agency, if one of two defendants with the knowledge and consent of the other has employed men to oust the plaintiff, the ouster is the act of both.[18]

§ 15. Necessity of Possession by Defendant.—An action of ejectment must be brought against the occupant of the premises in question[19] at the time of the commencement of the action.[20] Accordingly, the plaintiff must allege and prove such possession in the defendant.[1] If he fails

14. Depuy v. Williams, 26 Cal. 309.

15. Haight v. Green, 19 Cal. 113.

16. McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14; McKissick v. Ashby, 98 Cal. 422, 33 Pac. 729 (holding that the testimony of the plaintiff as to defendant's continued holding is admissible); Garrison v. Sampson, 15 Cal. 93. See LANDLORD AND TENANT.

17. Polack v. Mansfield, 44 Cal. 36, 13 Am. Rep. 151. See infra, § 16.

18. Treat v. Reilly, 35 Cal. 129. See AGENCY, vol. 1, p. 683.

19. Frazier v. Lynch, 97 Cal. 370, 32 Pac. 319; Polack v. Mansfield, 44 Cal. 36, 13 Am. Rep. 151; Dimick v. Deringer, 32 Cal. 488; Hawkins v. Reichert, 28 Cal. 534; Calderwood v. Braly, 28 Cal. 97; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Klink v. Cohen, 13 Cal. 623; Garner v. Marshall, 9 Cal. 268.

20. Sheldon v. Mull, 67 Cal. 299, 7 Pac. 710; Mahoney v. Middleton, 41 Cal. 41; Dimick v. Deringer, 32 Cal. 488; Hawkins v. Reichert, 28 Cal. 534; Carleton v. Townsend, 28 Cal. 219.

1. Frazier v. Lynch, 97 Cal. 370, 32 Pac. 319; Dillon v. Center, 68 Cal. 561, 10 Pac. 176; Soto v. Irvine, 60 Cal. 436; Shaeffer v. Matzen, 59 Cal. 652; Miller v. Chandler, 59 Cal. 540; Brown v. Brackett, 45 Cal. 167; Buhne v. Corbett, 43 Cal. 264; Doyle v. Franklin, 40 Cal. 106; Pope v. Dalton, 31 Cal. 218; Ellis v. Jeans, 26 Cal. 272 (holding the plaintiff cannot even recover damages if he does not prove possession in the defendant); Owen v. Morton, 24 Cal. 373; Owen v. Fowler, 24 Cal. 192; Noe v. Card, 14 Cal. 576; Suñol v. Hepburn, 1 Cal. 254; Moore v.

to do so he may be nonsuited. Or if he fails to prove possession in one of several defendants, a nonsuit as to such defendant will be granted,[2] although a nonsuit will not be granted simply as to a certain part of the premises sued for that is found not to have been in defendant's possession.[3] Where there are several defendants the plaintiff is required to show only that each of them is in possession of a portion of his land, the extent of the possession of each being immaterial,[4] although the plaintiff has a right to prove what part of the land was occupied by each of them, if he so desires.[5] Of course, a plaintiff cannot recover a judgment for land of which he himself holds possession.[6] And the judgment rendered should not include any land in his possession.[7]

§ 16. Possession Other Than Personal.—While, as just stated, the defendant must be in possession of the premises in dispute,[8] he need not be in the actual personal occupancy thereof, or reside thereon. He may be in possession through the agency of mere servants and employees acting under his direction and control,[9] or his possession may be merely constructive.[10] For instance, ejectment will lie against a party out of possession if he

Moore, 4 Cal. Unrep. 190, 34 Pac. 90; Partridge v. Shepard, 2 Cal. Unrep. 728, 12 Pac. 351. As to pleading, see infra, § 22. As to burden of proof, see infra, § 28.

2. Easton v. O'Reilly, 63 Cal. 305; Hussman v. Wilke, 50 Cal. 250; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; White v. Moses, 21 Cal. 34; Brigham v. Mullin, 1 Cal. Unrep. 823. See DISMISSAL, DISCONTINUANCE AND NONSUIT, ante, p. 502.

3. Dillon v. Center, 68 Cal. 561, 10 Pac. 176.

4. McCreery v. Everding, 44 Cal. 284; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103. See infra, § 30.

5. Ellis v. Janes, 10 Cal. 56.

6. Fisher v. Slattery, 75 Cal. 325, 17 Pac. 235; Palmer v. Cook, 1 Cal. Unrep. 25. As to right of one in possession to maintain an action to quiet title, see QUIETING TITLE.

7. Mahoney v. Middleton, 41 Cal. 41. See infra, § 31.

8. See supra, § 15.

9. Polack v. Mansfield, 44 Cal. 36, 13 Am. Rep. 151; Moore v. Moore, 4 Cal. Unrep. 190, 34 Pac. 90.

10. Crane v. Ghirardelli, 45 Cal. 235; Tubbs v. Ghirardelli, 45 Cal. 231; Moore v. Moore, 4 Cal. Unrep. 190, 34 Pac. 90.

claims title and the premises are not occupied by anyone else, provided his claim is accompanied by the exercise of acts of ownership such as inclosure, cultivation and the like.[11] But the possession of the defendant cannot be inferred simply from the fact that he has previously committed a trespass upon the possession of the plaintiff,[12] or from a mere assertion of title in conversation.[13]

In general, a mere servant or employee who is in possession of the premises but claims for himself no interest therein or right to their possession, cannot be sued in ejectment.[14] But this rule necessarily presupposes that the employer may be sued and that the wrongs of which plaintiff complains may be redressed by resort to an action against the employer as the real party committing the ouster. Accordingly, where the employer is for any reason not amenable to an action, the employee or servant necessarily becomes a proper party defendant, since he is the only party who can be subjected to suit at all.[15] This rule applies to an officer or agent of the government who is wrongfully in possession of land belonging to another.[16]

III. DEFENSES.

§ 17. Outstanding Title.—The plaintiff in ejectment must recover upon the strength of his own title and not upon the weakness of his adversary's.[17] Therefore, when

11. Garner v. Marshall, 9 Cal. 268.

12. Frazier v. Lynch, 97 Cal. 370, 32 Pac. 319.

13. Garner v. Marshall, 9 Cal. 268; Nichols v. Wolf, 27 Cal. App. 1, 148 Pac. 799.

14. Polack v. Mansfield, 44 Cal. 36, 13 Am. Rep. 151; Hawkins v. Reichert, 28 Cal. 534.

15. Polack v. Mansfield, 44 Cal. 36, 13 Am. Rep. 151.

16. King v. La Grange, 61 Cal. 221; Polack v. Mansfield, 44 Cal. 36, 13 Am. Rep. 151. See STATE OF CALIFORNIA, as to right to sue the state or its officers.

17. Reay v. Treadwell, 140 Cal. 412, 73 Pac. 1078, 74 Pac. 352; Sousa v. Pereira, 132 Cal. 77, 64 Pac. 90; Gray v. Dixon, 74 Cal. 508, 16 Pac. 305; McCourtney v. Fortune, 57 Cal. 617; Richardson v. McNulty, 24 Cal. 339; Moore v.

the plaintiff relies upon a paper title the defendant may show the true title to be outstanding in a third person at the time of the trial of the action,[18] without connecting himself with it.[19] The general rule has been to a certain extent qualified and limited in California as to public lands, owing to the anomalous condition of things arising from the peculiar character of the mining and landed interests of the country. In determining such controversies the court proceeds upon the presumption of a grant from the government to the first appropriator of mines, water privileges and the like.[20] A similar rule is followed, though not founded upon a like presumption, in controversies for the possession of lands where the real title is not in the government but in a person with whom neither party connects himself. The owner of the true title not objecting or consenting to the possession of either of the parties, the law regards the better right as between the parties to be vested in the first possessor and grantees claiming through him.[1] If the plaintiff's claim is based solely on prior possession, the defendant cannot defeat the action by showing title to be outstanding in a third person,[2] since prior possession is good against a naked intruder

Tice, 22 Cal. 513; Hubbard v. Barry, 21 Cal. 321; Coryell v. Cain, 16 Cal. 567; Pennsylvania Mining Co. v. Owens & Co., 15 Cal. 135; Busenius v. Coffee, 14 Cal. 91; McGarrity v. Byington, 12 Cal. 426; Woodworth v. Fulton, 1 Cal. 295; Roberts v. Ward, 3 Cal. App. 101, 84 Pac. 430; Cox v. Hayes, 2 Cal. Unrep. 520, 7 Pac. 761; Willson v. Truebody, 1 Cal. Unrep. 238.

18. Robinson v. Thornton, 3 Cal. Unrep. 741, 31 Pac. 936.

19. Robrecht v. Reid, 114 Cal. 356, 46 Pac. 1054; Gage v. Downey, 94 Cal. 241, 29 Pac. 635; Trenouth v. Gordon, 63 Cal. 379; Cranmer v. Porter, 41 Cal. 462; Willson v. Cleaveland, 30 Cal. 192; Moore v. Tice, 22 Cal. 513; Hubbard v. Barry, 21 Cal. 321; Coryell v. Cain, 16 Cal. 567; Gregory v. Haynes, 13 Cal. 591; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Welch v. Sullivan, 8 Cal. 511. Rule applied, Simson v. Eckstein, 22 Cal. 580.

20. McKissick v. Ashby, 98 Cal. 422, 33 Pac. 729; Gray v. Dixon, 74 Cal. 508, 16 Pac. 305; Moore v. Tice, 22 Cal. 513; Hubbard v. Barry, 21 Cal. 321; Coryell v. Cain, 16 Cal. 567. See MINES AND MINERALS; PUBLIC LANDS.

1. Hubbard v. Barry, 21 Cal. 321. Citing Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Bequette v. Caulfield, 4 Cal. 278, 60 Am. Dec. 615.

2. Foot v. Murphy, 72 Cal. 104,

even where title may be shown to exist in another.[3] The rule does not apply, however, to a case where such outstanding title is derived from the plaintiff himself, because in that case the plaintiff has divested himself of all right to possession by his own act and the right to maintain the action under his own claim of title is not in him but in a third person.[4]

§ 18. Abandonment—Limitation of Actions.—Where a plaintiff relies upon prior possession and the strict legal title is not involved, the defendant may defeat a recovery by proving that the premises were abandoned by the plaintiff before his alleged entry and were therefore at the time of the entry publici juris.[5] And this applies with equal force where the prior possession claimed is that of the plaintiff's grantor.[6] In such case the possession of the plaintiff at the time of the ouster must be proved.[7]

Limitation of actions.—Where the legal owner has the right of possession, he may bring ejectment at any time within the period of limitation.[8] This period is fixed by

13 Pac. 163; Southmayd v. Henley, 45 Cal. 101 (not even in mitigation of damages); Brumagim v. Bradshaw, 39 Cal. 24; Carleton v. Townsend, 28 Cal. 219; Richardson v. McNulty, 24 Cal. 339; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597; Woodworth v. Fulton, 1 Cal. 295, (doubted but not decided); Dondera v. O'Hara, 3 Cal. App. 633, 86 Pac. 985; Baird v. Duane, 1 Cal. Unrep. 492.

3. Richardson v. McNulty, 24 Cal. 339; Gregory v. Haynes, 13 Cal. 591; Bequette v. Caulfield, 4 Cal. 278, 60 Am. Dec. 615.

4. Dyson v. Bradshaw, 23 Cal. 528.

5. Hart v. Cox, 171 Cal. 364, 153 Pac. 391; McCreery v. Duane, 52 Cal. 262; Willson v. Cleaveland, 30 Cal. 192; Dyson v. Bradshaw, 23 Cal. 528; Gluckauf v. Reed, 22 Cal. 468; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Bequette v. Caulfield, 4 Cal. 278, 60 Am. Dec. 615. See ABANDONMENT, vol. 1, p. 13.

6. Partridge v. McKinney, 10 Cal. 181; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Bird v. Dennison, 7 Cal. 297.

7. Nichols v. Wolf, 27 Cal. App. 1, 148 Pac. 799.

8. See ADVERSE POSSESSION, vol. 1, p. 558.

section 318 of the Code of Civil Procedure,[9] which is as follows:

"No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."[10]

The code further provides that

"If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, . . . is at the time such title first descends or accrues, either: 1. Under the age of majority; 2. Insane; 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than life; the time not exceeding twenty years, during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, . . . but such action may be commenced . . . within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced . . . after that period."[11]

In determining the applicability of these statutes to a given case, a complaint which contains the essential allegations of fact entitling the plaintiff to recover the pos-

9. Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12; Anderson v. Fisk, 36 Cal. 625; Clarke v. Huber, 25 Cal. 593; McDonald v. Badger, 23 Cal. 393, 83 Am. Dec. 123; Morton v. Folger, 15 Cal. 275; Billings v. Hall, 7 Cal. 1; Billings v. Harvey, 6 Cal. 381 Hillyer v. Hynes, 33 Cal. App. 506, 165 Pac. 718; Bradley Bros. v. Bradley, 20 Cal. App. 1, 127 Pac. 1044. Section 319 of the Code of Civil Procedure, relating to causes of action arising out of title to real property, does not apply to actions of ejectment. McKee, J., dissenting in Tully v. Tully, 71 Cal. 338, 12 Pac. 246; Richardson v. Williamson, 24 Cal. 289; Hibberd v. Smith, 1 Cal. Unrep. 554. As to period applicable to recovery of damages, see infra, § 40.

10. Code Civ. Proc., § 318. See LIMITATION OF ACTIONS.

11. Code Civ. Proc., § 328; McNeil v. First Congregational Soc., 66 Cal. 105, 4 Pac. 1096; Crosby v. Dowd, 61 Cal. 557; Westphal v. Arnoux, 34 Cal. App. Dec. 612, 197 Pac. 395.

session of real property is to be regarded as a complaint for the recovery of real property regardless of what the other allegations or prayers may be.[12] As in other actions, the statute of limitations must be specially pleaded, and cannot be set up under a general denial.[13]

§ 19. Equitable Defenses.—It has frequently been said that in ejectment the legal title must prevail.[14] This is true only in the absence of a valid equitable defense,[15] set up in the answer,[16] since an equitable title of such a character as will entitle the holder to possession in equity will prevail even as against the holder of the legal title.[17] But such an equitable defense must meet the claim made by the plaintiff to the possession, and the equity presented must be of such a character that it may be ripened by a decree into a legal right to the premises or such as will estop the plaintiff from the prosecution of the action.[18]

12. Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Bradley Bros. v. Bradley, 20 Cal. App. 1, 127 Pac. 1044.

13. McCreery v. Duane, 52 Cal. 262. See LIMITATION OF ACTIONS.

14. Burke v. Bours, 92 Cal. 108, 28 Pac. 57; Hyde v. Mangan, 88 Cal. 319, 26 Pac. 180; Tully v. Tully, 71 Cal. 338, 12 Pac. 246; Kentfield v. Hayes, 57 Cal. 409; Emeric v. Penniman, 26 Cal. 119; Clark v. Lockwood, 21 Cal. 220; Estrada v. Murphy, 19 Cal. 248; Bohall v. Dilla, 114 U. S. 47, 29 L. Ed. 61, 5 Sup. Ct. Rep. 782, see, also, Rose's U. S. Notes.

15. Howard v. Hewitt, 139 Cal. 614, 73 Pac. 414; Burke v. Bours, 92 Cal. 108, 28 Pac. 57; Hartley v. Brown, 51 Cal. 465; Willis v. Wozencraft, 22 Cal. 607; Bohall v. Dilla, 114 U. S. 47, 29 L. Ed. 61, 5 Sup. Ct. Rep. 782, see, also, Rose's U. S. Notes. See ACTIONS, vol. 1, p. 313, as to right to plead equitable defenses in actions at law.

16. See infra, this section; and see infra, § 25.

17. Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190; Doherty v. Courtney, 150 Cal. 606, 89 Pac. 434; Hyde v. Mangan, 88 Cal. 319, 26 Pac. 180; Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764; Arguello v. Bours, 67 Cal. 447, 8 Pac. 49; Whittier v. Stege, 61 Cal. 238; Central Pac. R. R. Co. v. Mudd, 59 Cal. 585; Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624; Blum v. Robertson, 24 Cal. 127; Willis v. Wozencraft, 22 Cal. 607; Lestrade v. Barth, 19 Cal. 660; Meador v. Parsons, 19 Cal. 294; Estrada v. Murphy, 19 Cal. 248.

18. Wallace v. Maples, 79 Cal. 433, 21 Pac. 860; Blum v. Robertson, 24 Cal. 127; Downer v. Smith, 24 Cal. 114; Lestrade v. Barth, 19 Cal. 660; Estrada v. Murphy, 19

A defendant may set up a contract of purchase which gives him a right of entry and which has been completely executed and performed on his part, together with his continued possession;[19] or he may set up that the land was intended to be conveyed to him by deed but by a mistake in the description it was not included;[20] or that it is partnership property.[1] The possession of a mere lien, however, does not constitute a defense.[2]

If the defendant wishes to avail himself of an equitable defense he must set it up in his answer.[3] In such case the defendant becomes an actor and he should set forth the facts as fully as in a bill in equity praying a decree for a conveyance of the legal title.[4] This is true whether the facts are set up as an equitable defense or as a cross-complaint with a prayer for equitable relief.[5] While the

Cal. 248; Flint v. Conner, 35 Cal. App. Dec. 457, 200 Pac. 37; Bohall v. Dilla, 114 U. S. 47, 29 L. Ed. 61, 5 Sup. Ct. Rep. 782, see, also, Rose's U. S. Notes.

19. See infra, § 46.

20. Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764; Sheldon v. Mull, 67 Cal. 299, 7 Pac. 710.

1. Lowe v. Alexander, 15 Cal. 296.

2. Todhunter v. Armstrong, 6 Cal. Unrep. 27, 53 Pac. 446.

3. Dorn v. Baker, 96 Cal. 206, 31 Pac. 37; Hicks v. Lovell, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942; Hartley v. Brown, 51 Cal. 465; Hartley v. Brown, 46 Cal. 201; McCauley v. Fulton, 44 Cal. 355; Kenyon v. Quinn, 41 Cal. 325; Cadiz v. Majors, 33 Cal. 288; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Clark v. Huber, 25 Cal. 593; Blum v. Robertson, 24 Cal. 127; Lestrade v. Barth, 19 Cal. 660; Meador v. Parsons, 19 Cal. 294; Estrada v. Murphy, 19 Cal. 248; Brooks v. Tichner, 1 Cal. Unrep. 104; Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. 985. Rule applied, Manley v. Howlett, 55 Cal. 94.

4. Dorris v. Sullivan, 90 Cal. 279, 27 Pac. 216; Connolly v. Hingley, 82 Cal. 642, 23 Pac. 273. (The burden is upon the defendant to sustain the allegations of his equitable defense); Arguello v. Bours, 67 Cal. 447, 8 Pac. 49; Kentfield v. Hayes, 57 Cal. 409; Miller v. Fulton, 47 Cal. 146; Bruck v. Tucker, 42 Cal. 346; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Blum v. Robertson, 24 Cal. 127; Downer v. Smith, 24 Cal. 114; Lestrade v. Barth, 19 Cal. 660; Estrada v. Murphy, 19 Cal. 248. Applied, Cunningham v. Ashley, 45 Cal. 485. Rule applied, Tormey v. True, 45 Cal. 105. This is a special count by way of cross-complaint. Bohall v. Dilla, 114 U. S. 47, 29 L. Ed. 61, 5 Sup. Ct. Rep. 782, see, also, Rose's U. S. Notes.

5. McKinstry, J., dissenting, in Tully v. Tully, 71 Cal. 338, 12 Pac. 246; Arguello v. Bours, 67 Cal. 447, 8 Pac. 49.

defendant will usually pray for equitable relief, it has been held that he will be entitled to rely on his perfect equity as a defense, even though by lapse of time or otherwise he may have lost his right to an equitable decree.[6]

IV. PROCEDURE.

§ 20. Venue.—The constitution of California provides that

"All actions for the recovery of the possession of . . . real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated."[7]

And under the provisions of the Code of Civil Procedure actions for the recovery of real property or of an estate or interest therein must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial.[8] Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.[9] The provision of the constitution is mandatory,[10] and the superior court of a county other than that in which the land lies has no jurisdiction in an action of ejectment commenced there.[11] It does not relate, however, to the place of trial, the rules in that respect being those laid down in the code.[12]

6. Arguello v. Bours, 67 Cal. 447, 8 Pac. 49, overruling dicta in Kenyon v. Quinn, 41 Cal. 325, and Cadiz v. Majors, 33 Cal. 288.

7. Const., art. VI, § 5; Gomez v. Reed, 178 Cal. 759, 174 Pac. 658; Hancock v. Burton, 61 Cal. 70. See VENUE.

8. Code Civ. Proc., § 392; Doll v. Feller, 16 Cal. 432.

9. Code Civ. Proc., § 392.

10. Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157. See VENUE.

11. Urton v. Woolsey, 87 Cal. 38, 25 Pac. 154.

12. Hancock v. Burton, 61 Cal. 70.

§ 21. **Parties.**—As already stated, an action of ejectment may ordinarily be brought only against a person in possession of the premises in question at the time it is brought.[13] If several parties are in possession, all of them should be made defendants,[14] unless they entered separately and hold separate parcels, in which event a joint action cannot be maintained against them.[15] While the statute provides that any person who has or claims an interest in the controversy adverse to the plaintiff, may be made a party defendant,[16] it has been held that this provision does not apply to actions of ejectment.[17] The code provides, however, that if the land is in the possession of a tenant, the landlord may be joined as a party.[18] In ejectment the "matter in litigation" within the meaning of the statute relating to intervention, is the right of possession on the part of the plaintiff and his ouster by the defendant. Consequently, a person who is in no way connected with the right of possession asserted by the plaintiff or the defendant, but, on the contrary, alleges title in himself paramount to both, has no right of intervention.[19]

But it is specifically provided that

"When in an action for the recovery of real . . . property . . . a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by proper amendment."[20]

§ 22. **Complaint in General.**—At common law, four allegations were essential to a complaint in ejectment:

13. See supra, § 23. And see infra, § 43. For general rules as to parties, see PARTIES.

14. Fogarty v. Sparks, 22 Cal. 142.

15. Hicks v. Davis, 4 Cal. 67. As to joint defendants, see § 31, infra.

16. Code Civ. Proc., § 379, based on Practice Act, § 13.

17. Valentine v. Mahoney, 37 Cal. 389; Garner v. Marshall, 9 Cal. 268.

18. Code Civ. Proc., § 379. See infra, § 43.

19. Porter v. Garrissino, 51 Cal. 559; Reay v. Butler, 2 Cal. Unrep. 501, 7 Pac. 669. Code Civ. Proc., § 387. See PARTIES.

20. Code Civ. Proc., § 389.

title, lease, entry and ouster.[1] In California, the fictions of the common law are abolished,[2] and the complaint should allege that on a day designated the plaintiff was seised of land, describing it or some estate therein, that while thus possessed the defendant entered upon the same and ousted him and has ever since withheld the possession from him, to his damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster;[3] or, if the plaintiff relies on prior possession, the complaint should allege prior possession of the plaintiff and an entry and ouster by the defendant, and that the defendant is still in possession.[4] When the plaintiff alleges ownership, it is not necessary for him to allege the probative facts tending to establish it[5] or that he has

1. Payne v. Treadwell, 5 Cal. 310.

2. See supra, § 3.

3. Hildreth v. White, 66 Cal. 549, 6 Pac. 454; Coryell v. Cain, 16 Cal. 567; Payne v. Treadwell, 16 Cal. 220 (cited in McKay v. McDougal, 19 Mont. 488, 48 Pac. 988); Merryman v. Kirby, 13 Cal. App. 344, 109 Pac. 635; Beard v. Federy, 3 Wall. (70 U. S.) 478, 18 L. Ed. 88, see, also, Rose's U. S. Notes; Hardy v. Johnson, 1 Wall. (68 U. S.) 371, 17 L. Ed. 502, see, also, Rose's U. S. Notes.

4. McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Payne v. Treadwell, 16 Cal. 220; Boles v. Cohen, 15 Cal. 150; Boles v. Weifenback, 15 Cal. 144; Norris v. Russell, 5 Cal. 249; Booth v. Stone, 1 Cal. Unrep. 88. See supra, § 8.

5. Fuller v. Fuller, 176 Cal. 637, 169 Pac. 369; Nathan v. Pierssen, 164 Cal. 607, 130 Pac. 12; Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140; County of San Joaquin v. Budd, 96 Cal. 47, 30 Pac. 967; Hihn v. Mangenberg, 89 Cal. 268, 26 Pac. 968; Johnson v. Vance, 86 Cal. 128, 24 Pac. 863; Heeser v. Miller, 77 Cal. 192, 19 Pac. 375; Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245; Kirsch v. Brigard, 63 Cal. 319; Central Pac. R. R. Co. v. Mudd, 59 Cal. 585; Keller v. de Ruiz Ocana, 48 Cal. 638; McCarthy v. Yale, 39 Cal. 585; Garwood v. Hastings, 38 Cal. 216; Salmon v. Symonds, 24 Cal. 260; Payne v. Treadwell, 16 Cal. 220 (It is sufficient for the plaintiff to aver in respect to his title that he is seised of the premises, or of some estate therein, in fee, for life, or for years, according to the fact); Victor etc. Co. v. Cole, 11 Cal. App. 497, 105 Pac. 758; McFarland v. Matthai, 7 Cal. App. 599, 95 Pac. 179; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120. See Allen v. Holt, 2 Cal. Unrep. 485, 7 Pac. 421, holding that ownership in fee at the commencement of the action is not a necessary averment. For forms of complaint, see Keller v. Ruiz de Ocana, 48 Cal. 638; Patterson v. Ely, 19 Cal. 28; Payne v. Treadwell, 16 Cal. 220.

the right of possession since such right accompanies the ownership and follows as a conclusion of law from the seizin.[6] Indeed, a complaint would be insufficient which merely alleged a right of possession,[7] or which stated the evidentiary facts, unaccompanied by an allegation of ownership.[8] Under these rules it is not necessary for the plaintiff to set out his claim of title.[9] Such averments if made need not be denied in the answer[10] and will be stricken out upon motion.[11] Yet, if the plaintiff does undertake to set out these facts, he must include every fact which he will be required to prove in order to establish his title.[12] Furthermore, he is bound thereby to rely on the particular source of title alleged and cannot at the trial set up a different one.[13] In regard to prior possession, priority is sufficiently indicated by an averment that plaintiff was in possession at the time of the ouster by the defendant.[14] Yet inasmuch as the plaintiff must have the right of possession at the time of the commencement of the action,[15] it is not sufficient merely to allege that a right of possession has existed at some date prior to the commencement of the action.[16] As the place of trial of

6. McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14; Payne v. Treadwell, 16 Cal. 220.

7. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Gladwin v. Stebbins, 2 Cal. 103.

8. McCaughey v. Schuette, 117 Cal. 223, 59 Am. St. Rep. 176, 46 Pac. 666, 48 Pac. 1088.

9. Larco v. Casaneuava, 30 Cal. 560; Castro v. Richardson, 18 Cal. 478. Nor is an attack upon individual parts of the title of the opposing party a proper method of pleading. Nelson v. O'Brien, 139 Cal. 628, 73 Pac. 469.

10. Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88.

11. Larco v. Casaneuava, 30 Cal. 560; Coryell v. Cain, 16 Cal. 567.

12. Castro v. Richardson, 18 Cal. 478.

13. Eagan v. Delaney, 16 Cal. 85.

14. Fuller v. Fuller, 176 Cal. 637, 169 Pac. 369; Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578.

15. See supra, § 6.

16. Vance v. Anderson, 113 Cal. 532, 45 Pac. 816, overruling Kidder v. Stevens, 60 Cal. 414 (principal opinion); Salmon v. Symonds, 24 Cal. 260; Yount v. Howell, 14 Cal. 465; Allen v. Holt, 2 Cal. Unrep. 485, 7 Pac. 421. See Yount v. Howell, 14 Cal. 465, stating that the rule of the common law under which a fictitious demise was alleged, was that the plaintiff must prove the existence of a legal estate and right of entry at the exact date

the action is not the county of the residence of the parties,[17] it is not necessary that their residence be stated.[18]

Joinder of actions.—Distinct parcels of land may be included in the same complaint where they are covered by the same title and the action equally affects all parties,[19] provided they do not require different places of trial.[20] But the causes of action must be separately stated,[1] and the defendant is entitled to interpose by his answer or cross-complaint any defense he may have as to either or both of the parcels and to ask any affirmative relief necessary and proper for such defense.[2]

§ 23. Description of Property.—While the Practice Act required that a complaint for the recovery of real property describe it by metes and bounds,[3] it was held that this provision was only directory, and such description was not essential unless it was required to enable the officer charged with the execution of the judgment for possession to ascertain the locality and extent of the property.[4] The requirement of the code is that the property must be described in the complaint with such certainty as to enable the officer, upon execution, to identify it.[5]

of the demise laid in the declaration.

17. See supra, § 20.

18. Doll v. Feller, 16 Cal. 432.

19. Boles v. Cohen, 15 Cal. 150; Beard v. Federy, 3 Wall. (70 U. S.) 478, 18 L. Ed. 88, see, also, Rose's U. S. Notes; Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549. See ACTIONS, vol. 1, p. 364.

20. Boles v. Cohen, 15 Cal. 150. For rules governing place of trial, see § 20, supra.

1. Boles v. Cohen, 15 Cal. 150.

2. City of Eureka v. Gates, 120 Cal. 54, 52 Pac. 125.

3. Practice Act, § 58; Larco v. Casaneuava, 30 Cal. 560; Whitney v. Buckman, 19 Cal. 300; Beard v. Federy, 3 Wall. (70 U. S.) 478, 18 L. Ed. 88, see, also, Rose's U. S. Notes. See Grady v. Early, 18 Cal. 108, for description of mining claim held sufficient.

4. Whitney v. Buckman, 19 Cal. 300 (holding that objection must be taken by special demurrer); Doll v. Fellen, 16 Cal. 432; Beard v. Federy, 3 Wall. (70 U. S.) 478, 18 L. Ed. 88, see, also, Rose's U. S. Notes.

5. Code Civ. Proc., § 455; Friedman v. Southern California Trust Co., 179 Cal. 266, 176 Pac. 442; Hihn v. Mangenberg, 89 Cal. 268, 26 Pac. 968; Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080; Heilbron v. Heinlen, 72 Cal. 376, 14 Pac. 24;

Under established principles of pleading, it is sufficient to describe the property by section and township or part of a section of a certain survey,[6] or by name. In the latter case it will be presumed that the tract and the extent of its boundaries are well known by the name.[7] An allegation that the property is situated in a particular town, without stating the name of the county itself, is sufficient to show jurisdiction of the court where the court will take judicial notice that the town is in the county.[8] An evident mistake in the description may be corrected by an amendment.[9] But if a description is uncertain, it is a matter to be established by proof, not a ground for demurrer.[10]

§ 24. Allegation of Ouster—Prayer.—A plaintiff in ejectment must allege an ouster by the defendant, prior to the commencement of the action,[11] and possession in him at that time,[12] or a withholding of possession.[13] In alleging an ouster it is sufficient to allege that "defendant ousted the plaintiff" without stating the specific circumstances.[14]

Hildreth v. White, 66 Cal. 549, 6 Pac. 454; Whitney v. Buckman, 19 Cal. 300; Doll v. Feller, 16 Cal. 432; Merryman v. Kirby, 13 Cal. App. 344, 109 Pac. 635. See also Sherman v. McCarthy, 57 Cal. 507, where parol evidence was held admissible to show that the complaint complied with this rule.

6. Merryman v. Kirby, 13 Cal. App. 344, 109 Pac. 635. Where the description is both by metes and bounds and also by location as to sections, if the former is correct, the latter is immaterial. Fay v. McKeever, 57 Cal. 307.

7. Hildreth v. White, 66 Cal. 549, 6 Pac. 454; People v. Leet, 23 Cal. 161; Yount v. Howell, 14 Cal. 465; Castro v. Gill, 5 Cal. 40; Merryman v. Kirby, 13 Cal. App. 344, 109 Pac. 635; Beard v. Federy, 3 Wall. (70 U. S.) 478, 18 L. Ed. 88, see, also, Rose's U. S. Notes (limiting the rule, however, to properties which are well known).

8. Cole v. Segraves, 88 Cal. 103, 25 Pac. 1109. As to judicial notice, see EVIDENCE.

9. Heilbron v. Heinlen, 72 Cal. 371, 14 Pac. 22.

10. Carpentier v. Grant, 21 Cal. 140. See also Sherman v. McCarthy, 57 Cal. 507, where parol evidence was admitted to show that the description was sufficiently definite.

11. See supra, § 14.

12. See supra, § 15.

13. See infra, this section.

14. McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14; Garrison v. Sampson, 15 Cal. 93.

And it is not necessary to state the exact time thereof when no damages are prayed, since in that case the time is immaterial, provided it is prior to the commencement of the action,[15] and subsequent to the accrual of the plaintiff's right of possession.[16] A wrongful withholding of premises implies an ouster, and an allegation thereof is equivalent to an allegation of ouster.[17] And it is held that an allegation that defendant "is in possession and withholds the premises" is a proper averment of this fact, and not a mere conclusion of law.[18] A more particular statement of the circumstances of defendant's possession or withholding is not necessary under our system of practice, as such allegation in connection with an allegation of seizin in the plaintiff sufficiently shows the withholding to be wrongful.[19] Indeed, an allegation that a possession or right of possession is rightful or wrongful or lawful or unlawful is a mere conclusion of law; but as it is mere surplusage it does not vitiate the pleading.[20]

A prayer for restitution is not necessary, provided an answer is filed and the issues are raised; but if the defendant simply defaults, possession cannot be decreed without such a prayer.[1]

15. Cole v. Segraves, 88 Cal. 103, 25 Pac. 1109; Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190 (holding that the judgment is not conclusive as to the time of the ouster); McKinstry, J., dissenting in Kidder v. Stevens, 60 Cal. 414; Coryell v. Cain, 16 Cal. 567; Collier v. Corbett, 15 Cal. 183; Yount v. Howell, 14 Cal. 465.

16. Coryell v. Cain, 16 Cal. 567.

17. Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867; Marshall v. Shafter, 32 Cal. 176.

18. Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867; Payne v. Treadwell, 16 Cal. 220, overruling Gregory v. Haynes, 13 Cal. 591; Payne v. Treadwell, 5 Cal. 310.

19. Payne v. Treadwell, 16 Cal. 220, 244,

20. McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14; Johnson v. Vance, 86 Cal. 128, 24 Pac. 863 ("wrongful"); Kidder v. Stevens, 60 Cal. 414 (McKinstry, J., concurring); Payne v. Treadwell, 16 Cal. 220 ("lawful"); Payne v. Treadwell, 5 Cal. 310 ("wrongful or unlawful").

1. Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12. See also Collier v. Corbett, 15 Cal. 183, where it was held sufficient to pray that the defendant be required to surrender possession.

§ 25. Answer in General.—At common law the only plea allowed in ejectment was not guilty.[2] But under the present system, if the complaint is in proper form, the answer must contain some matter of denial or averment constituting a defense, either legal or equitable, to the action,[3] although, of course, the answer need deny only those allegations of the complaint which are material.[4] The answer must deny either the seizin of the plaintiff or the possession by the defendant.[5] If it admits possession of the defendant, it must deny the plaintiff's right of possession.[6] And, in respect to the latter, it has been held sufficient for a defendant to deny that the plaintiff, on the day alleged in the complaint "or at any other time, was possessed or entitled to the possession of said land and premises."[7] A denial of the entry is equivalent to a denial of the withholding.[8] And a denial that defendant "is or ever was in possession" is held to be sufficient in the absence of objection.[9] But a mere denial that defendant's possession is wrongful or unlawful admits the plaintiff's case, for a claim of right to retain possession is an affirmative defense and must be pleaded.[10] An allegation of title in the defendant is not new matter,[11] but is simply a general denial in argumentative form.[12] At all

2. Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692.

3. Code Civ. Proc., § 437 (Practice Act, 46); Hoffman v. Remnant, 72 Cal. 1, 12 Pac. 804; Marshall v. Shafter, 32 Cal. 176; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692. See Johnston v. Mendenhall, 37 Cal. App. Dec. 854, 207 Pac. 399, sustaining demurrer to defenses available under the first defense alleged. See supra, § 19.

4. Doyle v. Franklin, 48 Cal. 537.

5. F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214.

6. Pryor v. Madigan, 51 Cal. 178.

7. Weeks v. Link, 137 Cal. 502, 70 Pac. 548.

8. Hawkins v. Reichert, 28 Cal. 534.

9. Youdall v. Kaufman, 36 Cal. App. Dec. 819, 203 Pac. 448.

10. F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214; Busenius v. Coffee, 14 Cal. 91; Burke v. Table Mountain Water Co., 12 Cal. 403; Kerr v. Snowden, 24 Cal. App. 152, 140 Pac. 704; Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. 985. As to effect of allegations of lawfulness or unlawfulness generally, see § 24, supra.

11. Marshall v. Shafter, 32 Cal. 176.

12. Phillips v. Hogart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac.

events, such an allegation is insufficient which does not aver an adverse claim or possession in the defendant.[13] If the defendant claims title to a portion of the demanded premises, he must specify the portion claimed.[14]

§ 26. Pleading Several Defenses—Cross-complaint—Disclaimer.—It is a general rule of pleading that a defendant may interpose as many defenses as he thinks proper, even though they are inconsistent.[15] In ejectment, therefore, the answer may join to a denial of the plaintiff's title and right of possession an averment of a voluntary abandonment and forfeiture by him,[16] or a plea of the statute of limitations,[17] or it may allege both nonpossession and possession of an employer.[18]

Where the relief desired by the defendant can be had upon the denials and averments of the answer, a cross-complaint to quiet title is unnecessary, and a judgment for the defendant is equally as effectual, without it.[19] But the defendant may, in a proper case, file a cross-complaint if he so desires.[20] And under some circumstances a cross-complaint may be both proper and necessary,[1]

843; Clink v. Thurston, 47 Cal. 21; Marshall v. Shafter, 32 Cal. 176.

13. Anderson v. Fisk, 36 Cal. 625.

14. Anderson v. Fisk, 36 Cal. 625; Guy v. Hanly, 21 Cal. 397. See, however, Ellis v. Jeans, 26 Cal. 272, where an assessment of damages upon an entire tract was held erroneous even without such an answer, and it was said that inasmuch as the damages had been deemed, no more damages can be given than the plaintiff proves that he sustained.

15. Bell v. Brown, 22 Cal. 671. See PLEADING.

16. Bell v. Brown, 22 Cal. 671.

17. Dillon v. Center, 68 Cal. 561, 10 Pac. 176; Willson v. Cleaveland, 30 Cal. 192 ("Such are not inconsistent defenses"); Bell v. Brown, 22 Cal. 671.

18. Buhne v. Corbett, 43 Cal. 264.

19. Nelson v. O'Brien, 139 Cal. 628, 73 Pac. 469; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Doyle v. Franklin, 40 Cal. 106; Martin v. Molera, 4 Cal. App. 298, 87 Pac. 1104.

20. Code Civ. Proc., § 442. See PLEADING.

1. City of Eureka v. Gates, 120 Cal. 54, 52 Pac. 125; Winter v. McMillan, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; Martin v. Molera, 4 Cal. App. 298, 87 Pac. 1104 (holding that the rule in ejectment is identical with the rule in actions to quiet title and

as where the relief desired involves more than the title and right of possession and includes protection against harassing attempts to open questions already adjudicated.[2] The defendant may by a cross-complaint seek the specific performance of a contract to convey the demanded property.[3] But a cause of action in favor of a vendee for the recovery of money paid, on the ground of the failure of the vendor's title, cannot be so set up.[4]

A disclaimer of possession or interest is not a proper proceeding in an action of ejectment. Its use is limited to actions brought to determine estates or interests asserted against parties in possession by parties out of possession, and it amounts only to a denial of possession of the premises at the commencement of the action, or of having asserted any claim thereto. If such a disclaimer should be made in an ejectment suit and the plaintiff wishes to rely upon it, he should take a nonsuit as to the party disclaiming, but not a judgment by confession because it does not confess possession, and a judgment in ejectment cannot be entered against a party unless in possession.[5]

§ 27. **Proof Admissible Under General Denial.**—A general denial of the allegations of the complaint puts in issue the title of the plaintiff at the date alleged in the complaint, or at least his title at the commencement of the action,[6] and under it anything may be proved which tends to defeat the title alleged in the plaintiff.[7] Any other

the reasoning underlying one supports the other, and authorities applying to the latter class of actions apply with equal force to ejectment). See QUIETING TITLE.

2. Martin v. Molera, 4 Cal. App. 298, 87 Pac. 1104.

3. Jacob v. Carter, 4 Cal. Unrep. 543, 36 Pac. 381, holding that the issues may be tried separately.

4. Hoffman v. Remnant, 72 Cal. 1, 12 Pac. 804.

5. Ellis v. Jeans, 26 Cal. 272; Noe v. Card, 14 Cal. 576.

6. Marshall v. Shafter, 32 Cal. 176; Stites v. Gater, 5 Cal. Unrep. 389, 45 Pac. 185 (where the defendant admitted possession of a part); Hardy v. Johnson, 1 Wall. 371, 17 L. Ed. 502, see, also, Rose's U. S. Notes.

7. Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245 (quoting Pomeroy's Remedies

rule would require a defendant to foreknow and avoid by specific allegations a title which plaintiff was not bound to disclose, and the plaintiff being allowed, under a general averment of ownership, to prove any source of title available.[8] Under a general denial, therefore, a defendant may show fraud[9] or illegality of consideration[10] affecting the plaintiff's title; or he may introduce evidence of abandonment by the plaintiff[11] or of conveyance of his title to a third person.[12] Under such denial the defendant may also show title in himself;[13] he may introduce evidence tending to show that the plaintiff had no right of entry when the suit was brought;[14] and he may object to any defective deed or other void link in the plaintiff's chain of title when offered in evidence.[15] A general denial likewise puts in issue the possession of the defendant.[16] New matter is not provable under a general denial, however,[17] and the defendant cannot, under it, set up the statute of limitations[18] or prove a former recovery.[19]

and Remedial Rights, § 679); Holmes v. Salamanca etc. Co., 5 Cal. App. 659, 91 Pac. 160.

8. Holmes v. Salamanca etc. Co., 5 Cal. App. 659, 91 Pac. 160.

9. Holmes v. Salamanca etc. Co., 5 Cal. App. 659, 91 Pac. 160.

10. Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245.

11. Morenhaut v. Wilson, 52 Cal. 263 (holding, however, that a forfeiture under the mining laws must be specially pleaded); Bell v. Bed Rock etc. Co., 36 Cal. 214; Willson v. Cleaveland, 30 Cal. 192. See § 18, supra, and ABANDONMENT, vol. 1, p. 16.

12. Willson v. Cleaveland, 30 Cal. 192.

13. Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245; Roberts v. Columbet, 63 Cal. 22; Bruck v. Tucker, 42 Cal. 346; Marshall v. Shafter, 32 Cal. 176; Willson v. Cleaveland, 30 Cal. 192. See supra, § 25.

14. Cooper v. Miller, 113 Cal. 238, 45 Pac. 325; Dorn v. Baker, 96 Cal. 206, 31 Pac. 37; Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245; Stockton v. Knock, 73 Cal. 425, 15 Pac. 51; Semple v. Cook, 50 Cal. 26; Willson v. Cleaveland, 30 Cal. 192; Jacob v. Carter, 4 Cal. Unrep. 543, 36 Pac. 381.

15. Nelson v. O'Brien, 139 Cal. 628, 73 Pac. 469; Roberts v. Chan Tin Pen, 23 Cal. 259 (tax deeds).

16. Dillon v. Center, 68 Cal. 561, 10 Pac. 176; Miller v. Chandler, 59 Cal. 540.

17. See PLEADING.

18. McCreery v. Duane, 52 Cal. 262. See LIMITATION OF ACTIONS.

19. Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692.

§ 28. **Burden of Proof.**—In ejectment, the plaintiff must recover on the strength of his own title,[20] and the defendant may confine himself to merely rebutting the evidence of the plaintiff. He is not obliged to show that he has any title whatever, it being sufficient if he makes it appear that the plaintiff has no title or interest entitling him to possession at the time of the trial.[1] Yet under a general allegation of seizin it is sufficient for the plaintiff to establish any interest in the premises which gives him a right of present possession.[2] And where both parties claim through a common source of title, it is only necessary for the plaintiff to show a better right from that point onward. He is not obliged to prove the title of the common grantor.[3] Inasmuch as actual possession establishes presumption of title and right of possession, which can only be overcome by proof of prior possession or title from a paramount source, the burden is upon the plaintiff to show that the possession of the defendant is wrongful,[4] if this is put in issue.[5] But evidence of ouster should not be admitted until the plaintiff proves his title or right of possession.[6] Where in an action by a landlord against his tenant who is holding over after the termination of the tenancy the latter relies upon an eviction by one

20. See supra, § 17.

1. Irwin v. Towne, 42 Cal. 326; Hawxhurst v. Lander, 28 Cal. 331; Moore v. Tice, 22 Cal. 513.

2. Gillespie v. Jones, 47 Cal. 259; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Stark v. Barrett, 15 Cal. 361; Hardy v. Johnson, 1 Wall. 371, 17 L. Ed. 502, see, also, Rose's U. S. Notes (undivided part interest).

3. Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Spect v. Gregg, 51 Cal. 198; Whitman v. Steiger, 46 Cal. 256; Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. 987. As to rule that plaintiff in ejectment need not trace title back of common source, see 7 A. L. R. 860, note.

4. City of Oakland v. Buteau, 180 Cal. 83, 179 Pac. 170; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Marshall v. Shafter, 32 Cal. 176; Hawxhurst v. Lander, 28 Cal. 331; Carleton v. Townsend, 28 Cal. 219; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Partridge v. McKinney, 10 Cal. 181; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Potter v. Knowles, 5 Cal. 87; Western Cal. Land Co. v. Welch, 41 Cal. App. 435, 183 Pac. 169.

5. Ketchum v. Barber, 2 Cal. Unrep. 698, 12 Pac. 251.

6. Tibbets v. Blade, 60 Cal. 428.

having paramount title to that of the landlord, the burden is upon the tenant to prove both paramount title and eviction prior to the commencement of the action.[7]

§ 29. Trial of Issues.—Either party to an action of ejectment is entitled to a jury trial upon the strictly legal issues,[8] and this right cannot be avoided by framing the complaint in the form of an action to determine an adverse claim.[9] Nor is it affected by the filing of an intervention praying equitable relief.[10] It is improper, however, to submit issues including both legal and equitable defenses to the jury.[11] On the contrary, as in other cases, issues raised by an equitable defense should be first passed upon by the court.[12] If upon the hearing thereof the court should determine that there is ground for relief it should enjoin the further prosecution of the action; if, on the other hand, it should refuse relief, it will then call a jury to determine the issue upon a general denial.[13]

7. Camarillo v. Fenlon, 49 Cal. 202.

8. Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140; Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096 (holding this is true wherever the issue raised is substantially one in ejectment, even though it is initiated by a cross-complaint in a suit in equity); Weber v. Marshall, 19 Cal. 447; Reay v. Butler, 2 Cal. Unrep. 501, 7 Pac. 669. See JURY.

9. Newman v. Duane, 89 Cal. 597, 27 Pac. 66.

10. Reay v. Butler, 2 Cal. Unrep. 501, 7 Pac. 669.

11. Bodley v. Ferguson, 30 Cal. 511; Lestrade v. Barth, 19 Cal. 660; Weber v. Marshall, 19 Cal. 447.

12. Johnson v. Visher, 96 Cal. 310, 31 Pac. 106; Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; George v. Silva, 68 Cal. 272, 9 Pac. 257; Schieffery v. Tapia, 68 Cal. 184, 8 Pac. 878; Tormey v. Pierce, 42 Cal. 335; Bodley v. Ferguson, 30 Cal. 511; Lestrade v. Barth, 19 Cal. 660; Weber v. Marshall, 19 Cal. 447; Estrada v. Murphy, 19 Cal. 248 (holding that until the equitable defense is disposed of, the assertion of the legal remedy is stayed); Arguello v. Edinger, 10 Cal. 150. Rule applied, Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190. See TRIAL. As to right to object, for the first time on appeal, to a nonobservance of the rule, see APPEAL AND ERROR, vol. 2, p. 280.

13. Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190; Thomas v. Lawlor, 53 Cal. 405; Bodley v. Ferguson, 30 Cal. 511; Weber v. Marshall, 19 Cal. 447; Arguello v. Edinger, 10 Cal. 150.

While it has been said that actual possession is a mixed question of law and fact,[14] it is a question for the jury to determine whether or not the acts of dominion were sufficient to notify the public that the land in question was appropriated, and impart to the claim of appropriation the characteristic notoriety and indicia of ownership.[15]

§ 30. Verdict and Findings.—"In an action for the recovery of . . . specific real property, the jury, in their discretion, may render a general or special verdict."[16] A general verdict in favor of the plaintiff, where ownership is alleged in the complaint, determines that he is the owner of the demanded premises and that the defendant wrongfully withholds possession.[17]

Findings.—In case of a trial by the court, it is not necessary for it to make a finding as to the ultimate fact of ownership where successive conveyances from the original sources of title to the plaintiff are found.[18] And while it has been said to be better practice for the court to make a finding in respect to the facts upon which both parties rely for title, where they claim through different chains of title, it is not necessary to do so as to the title of the losing party.[19] When the complaint does not describe the property with reference to physical monuments, the court need not do so in its findings.[20]

14. Polack v. McGrath, 32 Cal. 15.

15. Dodge v. Yates, 76 Cal. 251, 18 Pac. 323; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705; Brumagim v. Bradshaw, 39 Cal. 24.

16. Code Civ. Proc., § 625; Joy v. McKay, 70 Cal. 445, 11 Pac. 763 (holding that a general verdict is sufficient); Hutton v. Reed, 25 Cal. 478, holding that a general verdict is not converted into a special verdict by the addition of the words "for the possession of the premises described in the complaint."

17. Johnson v. Visher, 96 Cal. 310, 31 Pac. 106.

18. McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14; Reavis v. Gardner, 6 Cal. Unrep. 427, 60 Pac. 694.

19. Merrill v. Chapman, 34 Cal. 251; S. C., sub nom. Morrill v. Chapman, 35 Cal. 85.

20. Miller v. Powell, 38 Cal. App. Dec. 201, 207 Pac. 945.

Joint and several verdict or findings.—Where there are several defendants who hold the demanded premises in severalty, and they set forth the specific description of the parcels which they severally occupy or claim, they may demand a several verdict or findings,[1] in which case several judgments may be entered;[2] but they will be concluded by a general verdict if they do not make such a demand,[3] or if they fail at the close of the trial to call the attention of the court or jury to a demand previously made.[4] And even when such a demand is made, the plaintiff is not precluded from proving his allegation that they were jointly in possession of the entire tract, and from taking a joint verdict and judgment against them.[5]

§ 31. Judgment.—A plaintiff in ejectment cannot recover any land not specified in his complaint;[6] nor can he recover a judgment for the entire premises described, where the defendant or an intervener shows a right to a part thereof.[7] Yet where the defendant is in possession of only a part of the premises, the judgment may nevertheless be for the entire tract if no damages are claimed, as the plaintiff is not bound to measure off and particularly define the spot the defendant has trespassed upon in order to put him off, when a general finding against the defendant answers the same purpose and does him no injury.[8]

1. Patterson v. Ely, 19 Cal. 28.

2. Lick v. Stockdale, 18 Cal. 219.

3. Leese v. Clark, 28 Cal. 26; Ellis v. Jeans, 26 Cal. 272; McGarvey v. Little, 15 Cal. 27; Ellis v. Jeans, 7 Cal. 409; Anderson v. Parker, 6 Cal. 197; Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597.

4. Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

5. Hancock v. Burton, 73 Cal. 52, 14 Pac. 392, holding that in the absence of any specification of the insufficiency of the evidence to prove a joint holding, a joint judgment will not be reversed.

6. Scott v. Rhodes, 5 Cal. Unrep. 131, 41 Pac. 878. See supra, § 15, as to recovery of land shown to be in possession of plaintiff. As to effect of judgment, see infra, §§ 33–35.

7. Hayes v. Martin, 45 Cal. 559; Reay v. Butler, 2 Cal. Unrep. 501, 7 Pac. 669.

8. Camarillo v. Fenlon, 49 Cal. 202; Lick v. Stockdale, 18 Cal. 219; Valley v. Fay, 10 Cal. 377.

Where the action is between tenants in common, it is proper for the court to determine the amount of the respective interests of the parties, on account of the questions of mesne profits and other matters that may arise.[9] And the same rule applies where one of the parties is the legal representative of a decedent.[10] The judgment must describe the property with sufficient certainty to enable the officer executing the same to locate definitely the premises in dispute.[11] If there are several defendants, each of whom is in possession of a different portion of the land, the judgment against each should be confined to the parcel in his possession.[12] But it cannot properly enjoin the defendant from claiming title, because the judgment itself constitutes a bar.[13]

Remission of excess.—If upon motion for a new trial the court discovers that the judgment includes more land than the plaintiff is entitled to, it may order a new trial unless the plaintiff shall remit the excess and dismiss his action to that extent, provided there is no uncertainty as to the amount of the excess.[14]

§ 32. Interlocutory Orders—Costs.—It is provided that "The court in which an action is pending for the recovery

See also Halsey v. Martin, 22 Cal. 645, where the question was not decided.

9. Mahoney v. Middleton, 41 Cal. 41, holding that if the plaintiff has conveyed part of the land to a defendant, the court should deduct this part from the judgment.

10. Plass v. Plass, 121 Cal. 131, 53 Pac. 448; Belcher v. Farren, 89 Cal. 70, 26 Pac. 791. As to actions involving legal representatives, see infra, § 47.

11. Rosenthal v. Matthews, 100 Cal. 81, 34 Pac. 624; Lawrence v. Davidson, 44 Cal. 177; Buckley v. Gadsby, 34 Cal. App. Dec. 473, 196 Pac. 908. For general principles governing judgments, see JUDGMENT.

12. Mahoney v. Middleton, 41 Cal. 41. See supra, § 30, as to several verdicts and findings.

13. Doyle v. Franklin, 40 Cal. 106; Ryan v. Smith, 1 Cal. Unrep. 751. See infra, § 33.

14. Gillespie v. Jones, 47 Cal. 259. See also Anderson v. Parker, 6 Cal. 197, holding that a clerical error in awarding more land than was claimed may be corrected. As to remission of damages in the appellate court, see APPEAL AND ERROR, vol. 2, p. 982; and on motion for new trial, see NEW TRIAL.

of real property . . . or a judge thereof, may, on motion, upon notice by either party for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to the parties to the action.'"[15] The court may also grant a restraining order against waste during the pendency of the litigation,[16] and appoint a receiver after judgment during the pendency of the appeal.[17]

Costs are allowed of course to the plaintiff upon a judgment in his favor in an action for the recovery of real property,[18] even though he recovers only part of the demanded premises.[19]

V. JUDGMENT AS A BAR.

§ 33. Conclusiveness of Judgment.—At common law a recovery in ejectment was not a bar to a second ejectment between the same parties for the same land, as the action was founded upon a fictitious demise, between fictitious parties, and by making a fresh demise to another nominal character it became the action of a new plaintiff upon another right.[20] The determination of the title was

15. Code Civ. Proc., § 742. "The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property he is liable therefor." Code Civ. Proc., § 743.

16. Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140; Hunt v. Steese, 75 Cal. 620, 17 Pac. 920; Curtis v. Sutter, 15 Cal. 259; Natoma etc. Co. v. Clarkin, 14 Cal. 544.

17. Garniss v. Superior Court, 88 Cal. 413, 26 Pac. 351. See RECEIVERS.

18. Code Civ. Proc., § 1022. See also COSTS, vol. 7, p. 257.

19. Lawton v. Gordon, 37 Cal. 202. See COSTS, vol. 7, p. 260.

20. Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

not available as a matter of estoppel, because it was not directly in issue. And thus the title—the "fact in controversy," but not "directly in issue"—might be again and again "collaterally and incidentally" tried. The inclusiveness of the judgment resulting from the form of proceeding was admitted to be an inconvenience, and the necessary remedy for it was an injunction, which was at length granted after two or more trials.[1]

But under modern practice a judgment in ejectment is as to all matters put in issue and passed upon in the action conclusive between the same parties and their privies in any subsequent action where the same matters are directly in issue.[2] Furthermore, the judgment concludes not only the questions actually in issue, but every right of possession which the losing party might have asserted under any title which he could have litigated in the action.[3] The judgment does not, however, transfer to the successful party the title of the adverse party; if presented in the proper mode whenever such adverse title is drawn in issue it shuts out all proof of such adverse title. Its effect bears closer resemblance to an extinguishment than a transfer of the adverse title. It awards possession to the prevailing party because he had title at the commencement of the action and because the losing party had no title or such as would not authorize him to withhold the possession.[4]

1. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187. See INJUNCTION.

2. Johnson v. Vance, 86 Cal. 110, 24 Pac. 862; Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190; Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475; Byers v. Neal, 43 Cal. 210; Satterlee v. Bliss, 36 Cal. 489; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Purcell v. Victor Power etc. Co., 29 Cal. App. 504, 156 Pac. 1009. See JUDGMENT. As to conclusiveness of judgment in separate action for mesne profits, see infra, § 41. As to prior action for possession in which claim might have been asserted by counterclaim, set-off or cross petition as bar to subsequent independent action thereon, see 8 A. L. R. 719, 720, note.

3. Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; Mann v. Rogers, 35 Cal. 316. See JUDGMENTS.

4. Mahoney v. Middleton, 41 Cal. 41; Marshall v. Shafter, 32 Cal.

§ 34. Extent of Estoppel.—An executed judgment for plaintiff is conclusive against the defendant in any subsequent suit commenced within the period of limitation, as to any asserted right founded merely upon the defendant's possession,[5] either at the commencement of the action[6] or at the rendition of judgment.[7] Generally, it concludes every right of possession which the defendant might have asserted under any title which he could have litigated in the action,[8] and if the title has been put in issue by the averments of the complaint, the judgment is conclusive upon that point.[9] But the judgment is no estoppel as to a title that is not or cannot be put in issue,[10] as, for in-

176; Valentine v. Jansen, 1 Cal. Unrep. 530.

5. Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475; Shinn v. Young, 57 Cal. 525; Satterlee v. Bliss, 36 Cal. 489; Mann v. Rogers, 35 Cal. 316; Marshall v. Shafter, 32 Cal. 176. See ADVERSE POSSESSION, vol. 1, p. 562.

6. Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; Marshall v. Shafter, 32 Cal. 176; Calderwood v. Brooks, 28 Cal. 151. The possession recovered in ejectment relates back to the commencement of the action; Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738.

7. Graves v. Hebbron, 125 Cal. 400, 58 Pac. 12; Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475; Marshall v. Shafter, 32 Cal. 176; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

8. Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33, stating that perhaps the judgment "does not conclude a prior title which, owing to the peculiar character of the pleadings, findings, and judgment, is clearly not embraced in the decision."

9. Miles v. Ryan, 172 Cal. 205, 157 Pac. 5; Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; Avery v. Superior Court, 57 Cal. 247; Marshall v. Shafter, 32 Cal. 176. See, however, Grady v. Early, 18 Cal. 108, where it is said that the judgment is not conclusive as to the title of plaintiff's grantors, especially where title is not involved. Contra, Yount v. Howell, 14 Cal. 465. Rule applied against holder of pre-emption receipt to public land before issuance of patent. Graves v. Hebbron, 125 Cal. 400, 58 Pac. 112; Phelan v. Tyler, 64 Cal. 86, 28 Pac. 114; Byers v. Neal, 43 Cal. 210.

10. Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; Burns v. Hodgdon, 64 Cal. 72, 28 Pac. 61. Rule applied to title of substituted plaintiff independent of that of the origi-

stance, a title acquired by the defendant subsequent to the filing of his answer,[11] or a title acquired subsequent to the rendition of the judgment.[12] The judgment does not prevent either party from showing in a subsequent action that the rights determined by the judgment have since been varied or extinguished.[13] Similarly, there is no estoppel as to an equitable title in the plaintiff[14] or an equitable defense not set up,[15] or as to different property or a different portion of the same property.[16] But where the action is to recover possession of two tracts, a judgment awarding one parcel only without reference to the other is an estoppel as to the latter also, because the failure to award relief is an adjudication that the successful party is not entitled to it.[17] A judgment in ejectment is conclusive on the question of damages for mesne profits if they are made an issue in the case, but not otherwise.[18] Of course, the judgment cannot be set up by the losing party as a bar to a second suit for the same purpose if it

nal plaintiff. Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190; Barrett v. Birge, 50 Cal. 655.

11. People's Savings Bank v. Hodgdon, 64 Cal. 95, 27 Pac. 938; Burns v. Hodgdon, 64 Cal. 72, 28 Pac. 61.

12. Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475; McDonald v. Burton, 68 Cal. 445, 9 Pac. 714; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Thompson v. McKay, 41 Cal. 221; Montgomery v. Whiting, 40 Cal. 294; Valentine v. Mahoney, 37 Cal. 389; Bagley v. Ward, 37 Cal. 121; Mann v. Rogers, 35 Cal. 316; Vance v. Olinger, 27 Cal. 358.

13. Graves v. Hebbron, 125 Cal. 400, 58 Pac. 12; Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475; Montgomery v. Whiting, 40 Cal. 294; Satterlee v. Bliss, 36 Cal. 489; Mahoney v. Van Winkle, 33 Cal. 448; Marshall v. Shafter, 32 Cal. 176; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187. See supra, this section.

14. O'Connor v. Irvine, 74 Cal 435, 16 Pac. 236; Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449. For the rule against setting up equitable title, see supra, § 7.

15. Hills v. Sherwood, 48 Cal. 386; Hough v. Waters, 30 Cal. 309. As to necessity of pleading equitable defenses, see supra, § 18.

16. Purcell v. Victor Power etc. Co., 29 Cal. App. 504, 156 Pac. 1009.

17. Thompson v. McKay, 41 Cal. 221; Marshall v. Shafter, 32 Cal. 176.

18. Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac.

has not been obeyed;[19] and a judgment rendered for the defendant for costs upon a special verdict that the defendant had not withheld possession from the plaintiff is not conclusive against him as to his title.[20]

A judgment in favor of a defendant not in possession that the plaintiff take nothing by his action does not involve the question of the plaintiff's title as to such defendant, and prevent him from showing such title in a subsequent action against the defendant.[1] Likewise, an adjudication that the defendant is not in fact in possession is not conclusive against him as to his right to the possession.[2] A transferee pendente lite, substituted as a party plaintiff, is authorized to prove only the title which the original plaintiff had at the commencement of the action, and consequently he is not concluded by a judgment for the defendant from maintaining a subsequent action on a title not litigated.[3]

§ 35. Upon Whom Conclusive.—A judgment binds the parties to the action and their privies, but no others,[4] even though they were in possession of the premises at the time the suit was brought.[5] Privies, within the meaning of the rule, includes those who have entered under, or

190. For a discussion of the subject of damages, see infra, §§ 39–42.

19. Southern Pac. R. R. Co. v. Purcell, 77 Cal. 69, 18 Pac. 886.

20. Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386.

1. Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386 (where a judgment for costs was rendered for defendant).

2. Burke v. Table Mountain Water Co., 12 Cal. 403.

3. Barrett v. Birge, 50 Cal. 655.

4. Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878; Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Porter v. Garrissino, 51 Cal. 559; Le Roy v. Rogers, 30 Cal. 229, 89 Am. Dec. 88; Wattson v. Dowling, 26 Cal. 124 (purchase from cotenant); Fogarty v. Sparks, 22 Cal. 142; Valentine v. Jansen, 1 Cal. Unrep. 630. See JUDGMENTS.

5. McLeran v. McNamara, 60 Cal. 610 (applying the rule where the person in possession, though originally a party, was dismissed from the action); South Beach Land Assn. v. Christy, 41 Cal. 501; Ford v. Doyle, 37 Cal. 346; Anderson v. Fisk, 36 Cal. 625; Calderwood v. Pyser, 31 Cal. 333; Sampson v. Ohleyer, 22 Cal. 200.

acquired an interest in the premises from or through, or entered without title and in collusion with, the parties in question, subservient to the commencement of the action;[6] as, for instance, their agents, servants or employees.[7] A judgment for or against an executor is binding upon the heirs and those claiming under them and upon the creditors of the estate, since it is the title of the decedent that is in issue and all these parties claim under that same title.[8] Furthermore, the judgment binds any person who bears such a relation to defendant's title that it was his duty to defend the action upon notice, provided he had a proper opportunity to do so.[9] Therefore, if either of the parties has a right of action against a third party in the event of his failure in the action of ejectment and on account of it, it is his duty to give full notice to that party of the pendency of the suit, otherwise the latter will not be bound by the judgment. Mere knowledge of the existence of the action in such case is not legal notice within the meaning of the rule.[10] Collusion, of course, disqualifies a defense of nonprivity, and one who enters upon the premises under the defendant or in collusion with him may be dispossessed under the writ.[11]

VI. Enforcement of Judgment.

§ 36. **In General.**—The party in whose favor a judgment for the possession of land is rendered, or in case of his death, his personal representative or successor in inter-

6. Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789; Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878; Satterlee v. Bliss, 36 Cal. 489; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

7. Satterlee v. Bliss, 36 Cal. 489.

8. Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; De La Ossa v. Oxarart, 58 Cal. 101; Cunningham v. Ashley, 45 Cal. 485. For discussion of actions by executors and administrators, see infra, § 47.

9. Calderwood v. Brooks, 28 Cal. 151. See infra, § 43.

10. Peabody v. Phelps, 9 Cal. 213. Distinguished in Sampson v. Ohleyer, 22 Cal. 200.

11. See infra, § 37.

est[12] is entitled to process of the court to put him in possession.[13] The writ must describe the land recovered in the judgment with sufficient clearness so that its boundaries appear on the face of the writ to be capable of identification by the sheriff in the field,[14] and must require the sheriff to deliver possession thereof to the party entitled thereto, and may at the same time require the sheriff to satisfy any costs, damages, rents or profits recovered by the judgment as is provided in the case of execution upon judgments for money generally.[15] When the plaintiff is put in possession pursuant to the writ, his possession rightfully includes not only the land described in the writ, but all the fixtures and improvements attached to the premises and all crops growing or standing thereon.[16]

§ 37. Execution of Writ.—When a writ of possession is placed in the hands of the sheriff for execution, it is his duty to execute it.[17] He must dispossess the defendant, his wife, and the family,[18] and all who have entered under the defendant since the commencement of the action,[19] but not persons who were not parties to the action and

12. Code Civ. Proc., § 686; Franklin v. Merida, 50 Cal. 289.

13. Hyde v. Boyle, 105 Cal. 102, 38 Pac. 643. For distinction from writ of assistance, see ASSISTANCE, WRIT OF, vol. 3, p. 332.

14. Lawrence v. Davidson, 44 Cal. 177.

15. Code Civ. Proc., § 682, subd. 5. See EXECUTIONS.

16. Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33 (holding that the defendant is not entitled to restitution for the purpose of cutting the growing crops); McMinn v. Mayes, 4 Cal. 209. But plaintiff cannot recover for the crops actually harvested before judgment was rendered; Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Rector v. Lewis, 46 Cal. App. 168, 188 Pac. 1018. See CROPS, vol. 8, p. 679; FIXTURES; IMPROVEMENTS.

17. If the sheriff fails or refuses to dispossess the proper parties, he and his sureties are liable to the plaintiff for such damages as he may sustain by reason of such failure or refusal. Long v. Neville, 29 Cal. 131.

18. Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Gray v. Nunan, 63 Cal. 220.

19. Hyde v. Boyle, 105 Cal. 102, 38 Pac. 643; Sampson v. Ohleyer, 22 Cal. 200.

who did not enter under the defendant while it was pending,[20] or in collusion with him.[1] Thus, the sheriff cannot dispossess a person in possession claiming under title paramount to or independent of that of the defendant.[2] In any particular case, the question whether a party found in possession when the writ issues, and not a party to the suit, must go out or not, is often one of great nicety.[3] Prima facie all who come into possession, after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant.[4] And this presumption is not overthrown by proof that they came in under a third party unless the necessary proof is made as regards the latter.[5] But the presumption is rebutted when it appears that the occupant is holding under a title adverse to the defendant, for the right to the possession flowing from such a title is not determined by the judgment.[6] If the circumstances are such that there is a reasonable doubt whether the sheriff has the right to turn them out, he may demand indemnity from the plaintiff, and unless it is given may refuse to execute the writ.[7] The court issuing the writ may, however,

20. Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878; Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Mayo v. Sprout, 45 Cal. 99; Ford v. Doyle, 37 Cal. 346; Rogers v. Parish, 35 Cal. 127; Calderwood v. Pyser, 31 Cal. 333; Tevis v. Ellis, 25 Cal. 515.

1. McCreery v. Everding, 54 Cal. 166; Mayo v. Sprout, 45 Cal. 99.

2. Moulton v. McDermott, 93 Cal. 660, 29 Pac. 259; Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878 (holding that it is immaterial whether he entered before or after suit or whether his title is good or not); McCreery v. Everding, 54 Cal. 166; Porter v. Garrissino, 51 Cal. 559.

3. Long v. Neville, 36 Cal. 455, 95 Am. Dec. 199; Id., 29 Cal. 131.

4. Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789; Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166; Leese v. Clark, 29 Cal. 664; Long v. Neville, 29 Cal. 131; Valentine v. Jansen, 1 Cal. Unrep. 530; Baum v. Roper, 1 Cal. App. 435, 82 Pac. 390.

5. Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166; Leese v. Clark, 29 Cal. 664.

6. Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Leese v. Clark, 29 Cal. 664; Long v. Neville, 29 Cal. 131.

7. Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33 (holding that the sheriff may refuse absolutely); Long v. Neville, 36 Cal. 455, 95 Am. Dec. 199.

order the sheriff to execute it against such person, and upon the hearing under an order upon the sheriff to show cause why an order should not be made requiring him to proceed according to the writ, the burden is upon him to show that the parties in possession or their grantors were in possession at the time of the institution of the action.[8] On the other hand, if the sheriff attempts to dispossess the wrong party, the latter will be protected upon a proper application to the court, or if he has already been dispossessed, his possession will be restored[9] if he makes out a clear case.[10]

If the defendant appeals from the order issuing the writ and the order is reversed, he is entitled to be restored to all that he has lost by virtue thereof and to be placed in the same position as he was prior to the execution of the writ. This requires the removal of all persons who have been placed in possession of the land by virtue of the writ as well as all others who have come under them subsequently.[11]

§ 38. Re-entry After Dispossession.—Under the law of California, every person who has been removed from any lands by process of law, or who has been removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal, or officer, and who afterwards unlawfully returns to settle, reside upon or take possession of such lands, is guilty of a misdemeanor,[12] and is also guilty of a contempt of the court from which such process issued.[13]

"Upon conviction for such contempt the court must immediately issue an alias process directed to the proper

8. Leese v. Clark, 29 Cal. 664.

9. Mayo v. Sprout, 45 Cal. 99; Calderwood v. Pyser, 31 Cal. 333; Valentine v. Jansen, 1 Cal. Unrep. 530.

10. California etc. Mining Co. v. Redington, 50 Cal. 160.

11. Hyde v. Boyle, 105 Cal. 102, 38 Pac. 643. See APPEAL AND ERROR, vol. 2, pp. 1000, 1062.

12. Pen. Code, § 419.

13. Code Civ. Proc., § 1210; Batchelder v. Moore, 42 Cal. 412; Mahoney v. Van Winkle, 33 Cal. 448; People v. Dwinelle, 29 Cal. 632. See CONTEMPT, vol. 5, p. 920.

officer, and requiring him to restore such possession to the party entitled under the original judgment or process, or to his lessee, grantee or successor in interest, and no appeal from the order directing the issuance of an alias writ of possession stays the execution thereof, unless a written undertaking is executed on the part of the appellant, with two or more sureties to the effect that he will not commit or suffer to be committed any waste thereon, and if the order is affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of his unlawful re-entry until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the order for the alias writ was made, and which must be specified in the undertaking."[14]

The latter provision is intended to give the party materially injured an additional remedy in the action for the restoration to him of what he was entitled to by the judgment.[15] If the plaintiff has been put in possession under a writ of possession, an alias writ cannot issue except upon adjudication that the defendant is guilty of contempt.[16] But upon such adjudication, the court has no discretion to refuse the writ.[17] An alias writ should not, however, issue against one who enters under a subsequently acquired title,[18] or where sufficient time has elapsed thereafter to create a title by adverse possession and bar an action to recover possession.[19]

14. Code Civ. Proc., § 1210, based on Stats. 1862, p. 115; Dutra v. Pereira, 135 Cal. 320, 67 Pac. 281; Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247; Temple v. Superior Court, 70 Cal. 211, 11 Pac. 699; Larrabee v. Selby, 52 Cal. 506; People v. Dwinelle, 29 Cal. 632.

15. People v. Dwinelle, 29 Cal. 632 (decided under similar provision in act of 1862).

16. Rousset v. Reay, 3 Cal. Unrep. 717, 31 Pac. 900, 32 Pac. 171.

17. Huerstal v. Muir, 62 Cal. 479;

18. See CONTEMPT, vol. 5, p. 920, note 3.

19. Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Rousset v. Reay, 3 Cal. Unrep. 717, 31 Pac. 900, 32 Pac. 171.

VII. RECOVERY OF DAMAGES AND COMPENSATION FOR IMPROVEMENTS.

§ 39. Damages for Withholding.—At common law a person who has been ousted from land might, after a recovery and re-entry, maintain his action for trespass for the mesne profits and waste, for the reason that after re-entry the law supposed he had always been seised and the acts of the defendant were a continuous trespass upon the rightful possession of the plaintiff.[20] But this action for mesne profits could not be maintained except after a judgment for the recovery of the premises itself.[1] At the present time the law gives to the plaintiff in ejectment a similar right to recover from the defendant the value of the use and occupation of the land, which is termed "damages," for the withholding thereof,[2] it being provided that

"The plaintiff may unite several causes of action in the same complaint where they all arise out of . . . claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same."[3]

But this right is optional, and the plaintiff may still bring the actions separately.[4] The claims for damages

20. Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462.

1. Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12.

2. Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979; Martin v. Durand, 63 Cal. 39.

3. Code Civ. Proc., § 427, subd. 2, re-enacting Practice Act, § 64, subd. 2; Alden v. Mayfield, 164 Cal. 6, 127 Pac. 45; Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091 (where plaintiff claimed as heir); Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12; Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; Locke v. Peters, 65 Cal. 161, 3 Pac. 657; Love v. Shartzer, 31 Cal. 487; Bay v. Pope, 18 Cal. 694; Yount v. Howell, 14 Cal. 465; Sullivan v. Davis, 4 Cal. 291; Beckman v. Waters, 3 Cal. App. 734, 86 Pac. 997; Brown v. Yarraham Gold Min. Co., 3 Cal. App. 474, 86 Pac. 744 (proportion of gold taken from mine; Beard v. Federy, 3 Wall. (70 U. S.) 478, 18 L. Ed. 88, see, also, Rose's U. S. Notes. See ACTIONS, vol. 1, p. 353.

4. Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12; Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53,

for withholding and for rents and profits are both considered as in the nature of an alleged trespass for mesne profits, and therefore, whether sought separately or contemporaneously with an action of ejectment, they cannot be recovered unless the property itself is recovered.[5]

§ 40. Computation of Damages.—A plaintiff in ejectment cannot recover damages for any portion of the land in controversy which was not occupied by the defendant,[6] or damage to other premises.[7] Damages run from the time of the ouster[8] if not prior to the accrual of plaintiff's right,[9] through the period of the withholding,[10] and up to the time of the rendition of the judgment,[11] except during any period when the defendant's possession was by permission of the plaintiff,[12] and not exceeding five years next preceding the commencement of the action.[13] The detriment caused also includes costs,

38 Pac. 979; Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190; Haggin v. Clark, 51 Cal. 112; Donner v. Palmer, 1 Cal. Unrep. 392; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

5. Locke v. Peters, 65 Cal. 161, 3 Pac. 657; Carpentier v. Mitchell, 29 Cal. 330 (action between cotenants); Carpentier v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764. See, however, Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12, where the court declined to so decide.

6. Ellis v. Jeans, 26 Cal. 272.

7. Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12. See ACTIONS, vol. 1, p. 322.

8. Yount v. Howell, 14 Cal. 465.

9. Clark v. Boyreau, 14 Cal. 634.

10. F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214; Johnson v. Visher, 96 Cal. 310, 31 Pac. 106; Hannan v. McNickle, 82 Cal. 122, 23 Pac. 271; Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12; Patterson v. Ely, 19 Cal. 28; Donner v. Palmer, 1 Cal. Unrep. 392.

11. F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214; Hannan v. McNickle, 82 Cal. 122, 23 Pac. 271; Love v. Shartzer, 31 Cal. 487.

12. Ross v. Evans, 65 Cal. 439, 4 Pac. 443.

13. Civ. Code, § 3334; Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12. See Love v. Shartzer, 31 Cal. 487; Carpentier v. Mitchell, 29 Cal. 330; Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764, citing the statute limiting the time to commence an action for trespass upon real property to three years, and holding the plaintiff can recover the rents and profits for three years only, if the statute of limitations is pleaded. See LIMITATION OF ACTIONS.

if any, of recovering the possession.[14] Interest may also be allowed when necessary to complete indemnity.[15] Where the complaint fails to allege the defendant's possession prior to the action, the damages run merely from the commencement of the action to the time of the rendition of the judgment.[16] The same is true where there is no proof of an ouster, except a denial of plaintiff's title and rights of entry in the answer of the defendant.[17] The damages may be established either by showing the rents and profits actually received or by proving the annual rental value of the land.[18] The owner of an undivided interest is entitled to recover only his proportionate share of the rents and profits, even though he is given a judgment for possession of the entire premises.[19] In the case of a lease, if the tenant was not in possession at any time during the term of the lease, the damages for the unlawful withholding are payable to the landlord.[20]

§ 41. Procedure.—Damages cannot be allowed unless they are claimed in the complaint.[1] But a general aver-

14. Civ. Code, § 3334; Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12; Patterson v. Ely, 19 Cal. 28. See supra, § 32.

15. Civ. Code, § 3287; Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12; Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12. See Haggin v. Clark, 51 Cal. 112, saying that sometimes the plaintiff may recover more than the rental value; and where there is evidence of malice, and perhaps under other circumstances, the court will not interfere although the jury may find damages in a gross sum, made up of the value of the rents and interest. The court cannot, however, add interest as a matter of law to the amount of damages fixed in the verdict or findings. See DAMAGES, vol. 8, p. 789.

16. F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214.

17. Miller v. Myers, 46 Cal. 535.

18. Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12; F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214; Love v. Shartzer, 31 Cal. 487; Italian-American Bank v. Canepa, 35 Cal. App. Dec. 174, 199 Pac. 55.

19. McGuire v. Lynch, 126 Cal. 576, 59 Pac. 27; Muller v. Boggs, 25 Cal. 175; Clark v. Huber, 20 Cal. 196. As to actions by cotenants, see infra, § 45.

20. Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190.

1. McKinlay v. Tuttle, 42 Cal. 570.

ment of and prayer for a certain amount as damages by reason of the alleged unlawful withholding of the property is sufficient, at least in the absence of a special demurrer to the pleading or objection to the evidence of damage.[2] If damages for any period preceding the commencement of the action are claimed, the complaint must state the right of the plaintiff as existing at some prior designated date and as continuing up to the commencement of the action, and allege the ouster by the defendant at some date subsequent to the beginning of the alleged right.[3] Where the allegation as to the value of the rents and profits is in effect only an allegation of the value of the use and occupation, it is not necessary to allege that the defendant received the rents and profits.[4] A denial that the withholding of the possession has caused the plaintiff damage "in the sum stated in the complaint or for any other sum whatsoever" is a sufficient traverse of the allegation of damages, but is not technically a denial of the value of the rents and profits which constitute the measure of the damages.[5] A judgment in ejectment is conclusive evidence of the right of possession of the plaintiff at the time of the commencement of the action, when introduced in a separate action for mesne profits.[6] A general verdict is a sufficient basis for a judgment for rents and profits.[7] But there must be a finding as to the value of the use and occupation.[8]

2. Martin v. Durand, 63 Cal. 39; Taylor v. Palmer, 31 Cal. 240.

3. Payne v. Treadwell, 16 Cal. 220.

4. Johnson v. Visher, 96 Cal. 310, 31 Pac. 106; Patterson v. Ely, 19 Cal. 28.

5. Gervaise v. Brookins, 156 Cal. 110, 103 Pac. 332. Compare F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214, holding that a denial that the plaintiff had been damaged makes no issue where the value of the rents and profits was admitted. See PLEADING.

6. Avery v. Superior Court, 57 Cal. 247; Mahoney v. Middleton, 41 Cal. 41; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Yount v. Howell, 14 Cal. 465.

7. Johnson v. Visher, 96 Cal. 310, 31 Pac. 106. As to form of verdict, see supra, § 30; and TRIAL.

8. Camarillo v. Fenlon, 49 Cal. 202.

§ 42. Compensation for Improvements.—"When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff in good faith, the value of such improvements must be allowed as a setoff against such damages."[9] To come within the application of this statute, the holding of the defendant must have been adverse to the claim of the plaintiff,[10] and must be in good faith and under color of title.[11] If the defendant acquired his color of title subsequent to the time he made the improvements, he is not entitled to the benefit of the statute.[12] Furthermore, the statute does not contemplate improvements made after the plaintiff's title accrued,[13] still less those made after the commencement of the action.[14] Since under the express terms of the statute the allowance can only be made as a setoff for damages,[15] it cannot be made if there is no

9. Code Civ. Proc., § 741, based on Practice Act, § 257; Hannan v. McNickle, 82 Cal. 122, 27 Pac. 271; Wise v. Burton, 73 Cal. 174, 14 Pac. 683; Anderson v. Fisk, 36 Cal. 625; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Bay v. Pope, 18 Cal. 694; Yount v. Howell, 14 Cal. 465; Welch v. Sullivan, 8 Cal. 165, 511; Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326. See Welch v. Sullivan, 8 Cal. 165, and Billings v. Hall, 7 Cal. 1, held unconstitutional a similar statute of 1856. At common law no such allowance was made. Ford v. Holton, 5 Cal. 319. See IMPROVEMENTS.

10. Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326 (possession under a bond for a deed); Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764.

11. Carpentier v. Small, 35 Cal. 346; Love v. Shartzer, 31 Cal. 487; Carpentier v. Mitchell, 29 Cal. 330; White v. Moses, 21 Cal. 34. By "color of title" is meant semblance or appearance of title. Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4764. See ADVERSE POSSESSION, vol. 1, p. 571.

12. Carpentier v. Mitchell, 29 Cal. 330.

13. Haggin v. Clark, 51 Cal. 112; Carpentier v. Small, 35 Cal. 346; Bay v. Pope, 18 Cal. 694.

14. Welch v. Sullivan, 8 Cal. 165, 511; Janke v. McMahon, 21 Cal. App. 781, 133 Pac. 21.

15. Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; Yount v. Howell, 14 Cal. 465; Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370 (not as a mere defense); Anderson v. Fisk, 36 Cal. 625.

claim for damages,[16] or if there is a remittitur of all the damages awarded.[17] So also if a court finds that the amount found due for improvements exceeds the damages due the plaintiff and refuses to render a judgment for rent or damages, no further allowance can be made.[18] In accord with the general rules of pleading, a defendant desiring to claim a setoff under this section must set out in the answer the essential elements of his right to the setoff.[19]

VIII. PARTICULAR RELATIONS.

§ 43. Landlord and Tenant.—The right of landlords and tenants to bring ejectment against each other has been considered above.[20] As to actions by third persons for property held under a lease it was formerly the rule that the tenant was the only proper defendant, and that the court on the hearing would on motion order a nonsuit as to the landlord if made a party,[1] unless, of course, he was also an occupant of the premises,[2] although it was said that the court might itself direct that the landlord be made a party in order to make a complete determination of the controversy.[3] The tenant, however, might notify the landlord of the pendency of the action, and the landlord might voluntarily appear and defend in the tenant's name a suit,[4] or, it has been held, be substituted in

16. Ford v. Holton, 5 Cal. 319; Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370; McMinn v. Mayes, 4 Cal. 209.

17. Yount v. Howell, 14 Cal. 465.

18. Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; Welch v. Sullivan, 8 Cal. 511.

19. Carpentier v. Small, 35 Cal. 346; Carpentier v. Gardiner, 29 Cal. 160; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Welch v. Sullivan, 8 Cal. 165. See SETOFF AND COUNTERCLAIM.

20. See supra, § 5.

1. Dimick v. Deringer, 32 Cal. 488; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

2. Hawkins v. Reichert, 28 Cal. 534.

3. Sampson v. Ohleyer, 22 Cal. 200.

4. Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; Reay v. Butler, 69 Cal. 572, 11 Pac. 463 (admitting without de-

his place,[5] particularly where his title is drawn in issue.[6] If the tenant had previously made default, the landlord might upon a proper showing move in the name of the tenant to have the default set aside.[7] The practice is recognized under the code, it being provided that

"Every tenant who receives notice of any proceeding to recover the real property occupied by him, or the possession thereof, must immediately inform his landlord of the same, and also deliver to the landlord the notice, if in writing, and is responsible to the landlord for all damages which he may sustain by reason of any omission to inform him of the notice, or to deliver it to him [if] in writing."[8]

But it is also specifically provided that the landlord may be made a party defendant.[9] The appearance or substitution of the landlord in an action against the tenant, should be entered of record and should be allowed only after notice to the parties,[10] and after this is done, the tenant cannot interfere with any subsequent proceedings to the prejudice of his landlord.[11] It has been held,

ciding that this includes equitable defenses); Porter v. Garrissino, 51 Cal. 559; Valentine v. Mahoney, 37 Cal. 389; Dimick v. Deringer, 32 Cal. 488; Calderwood v. Brooks, 28 Cal. 151; Reay v. Butler, 2 Cal. Unrep. 501, 7 Pac. 669. This right extends to the appeal and final disposition of the case. Sampson v. Ohleyer, 22 Cal. 200.

5. Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765. Compare Dimick v. Deringer, 32 Cal. 488, where the court say: "The landlord may, however, in most cases, and perhaps in all cases in which his title is drawn in issue, be permitted to assume the defense and defend the action in the name of his tenant, but there is no other mode in which he can come into the action."

6. Valentine v. Mahoney, 37 Cal. 389; Dimick v. Deringer, 32 Cal. 488.

7. Dimick v. Deringer, 32 Cal. 488.

8. Civ. Code, § 1949.

9. Code Civ. Proc., § 379; Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Oakland Gas Light Co. v. Dameron, 67 Cal. 663, 8 Pac. 595; Easton v. O'Reilly, 63 Cal. 305; Moore v. Moore, 4 Cal. Unrep. 190, 34 Pac. 90.

10. Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; Valentine v. Mahoney, 37 Cal. 389 (per concurring opinion); Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

11. Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Valentine v. Mahoney, 37 Cal. 389; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

however, that where the defendant upon being served with notice demanding possession of the premises admits that he holds possession but refuses to surrender, his tenant from month to month in actual possession need not be made a party.[12]

§ 44. **Effect of Judgment.**—If a landlord appears and defends an action of ejectment against his tenant, the judgment rendered is conclusive upon him in a subsequent action,[13] whether between him and the tenant,[14] or between him and the former plaintiff.[15] That is to say, he will be bound where he appears upon the record to have taken the defense upon himself.[16] On the other hand, a judgment against the tenant does not bind him unless he had notice of the action and an opportunity to defend,[17] or if he did not appear in the action.[18] Moreover, the judgment will not be binding upon the landlord, if his title was not passed upon, as where he was dismissed from the action and his deraignment of title stricken out.[19] A tenant of the defendant who acquired his lease before the commencement of the action is not estopped as to his term by a judgment against the landlord, in an action to which

12. City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247.

13. Davis v. Perley, 30 Cal. 630.

14. Valentine v. Mahoney, 37 Cal. 389; Wheelock v. Warschauer, 34 Cal. 265.

15. Russell v. Mallon, 38 Cal. 259; Sampson v. Ohleyer, 22 Cal. 200.

16. Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571 (holding a judgment in favor of a tenant is not conclusive as an estoppel in favor of the landlord, unless he appeared openly in the case and was permitted to undertake the defense. The fact that the tenant was represented by an attorney employed by the landlord is not sufficient to establish the estoppel); Valentine v. Mahoney, 37 Cal. 389, per concurring opinion, where it is said to be dangerous to extend the rule to cases where there is nothing in the record to show that the landlord took the defense upon himself.

17. Chant v. Reynolds, 49 Cal. 213; Douglas v. Fulda, 45 Cal. 592; Steinback v. Krone, 36 Cal. 303.

18. Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; Altschul v. Polack, 55 Cal. 633.

19. Altschul v. Polack, 55 Cal. 633.

he is not a party.[20] If the tenant is evicted on final process by a party claiming adversely to the landlord, the tenancy thereby ceases and he is at liberty to take a lease from the successful party, and under such a lease he holds adversely and not in subordination to the title of the original landlord.[1] Where a lessee brings an action of ejectment for the benefit of the lessor and the latter verifies the complaint showing his title to the premises, he will be bound by the judgment on the ground that the action was brought to determine his title.[2]

§ 45. Actions by Cotenants.—A tenant in common may bring an action of ejectment against anyone other than his cotenants for his undivided portion,[3] or for the entire premises, without joining his cotenants,[4] and in such a case the judgment determines the right of possession of the entire premises as of the commencement of the action.[5] Proof of a tenancy in common is sufficient to sustain even an allegation of seizin in fee of the entire premises.[6] Similarly, a partner can bring ejectment against an intruder for the entire premises without joining the other part-

20. Satterlee v. Bliss, 36 Cal. 489; Sampson v. Ohleyer, 22 Cal. 200.

1. Steinback v. Krone, 36 Cal. 303; Wheelock v. Warschauer, 34 Cal. 265 (holding that appeal does not revive original tenancy).

2. Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190.

3. Welch v. Sullivan, 8 Cal. 165; Covillaud v. Turner, 7 Cal. 39. For rules of substantive law relating to cotenants, see COTENANCY, vol. 7, p. 328.

4. Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190; McGuire v. Lynch, 126 Cal. 576, 59 Pac. 27; Moulton v. McDermott, 80 Cal. 629, 82 Pac. 296; Christy v. Fisher, 58 Cal. 256; Morenhaut v. Wilson, 52 Cal. 263; Chipman v. Hastings, 50 Cal. 310; Treat v. Reilly, 35 Cal. 129; Colman v. Clements, 23 Cal. 245; Rowe v. Bacigalluppi, 21 Cal. 633; Mahoney v. Van Winkle, 21 Cal. 552; Hart v. Robertson, 21 Cal. 346; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Stark v. Barrett, 15 Cal. 361; Collier v. Corbett, 15 Cal. 183; Waring v. Crow, 11 Cal. 366. See COTENANCY, vol. 7, p. 370.

5. Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190 (holding that such an action prevents the running of the statute of limitations against the other tenants in common); Newman v. Bank, 80 Cal. 368, 13 Am. St. Rep. 169, 5 L. R. A. 467, 22 Pac. 261.

6. Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Stark v. Barrett, 15 Cal. 361.

ners.[7] At common law and in the early history of California a joint action by all the cotenants was held improper, as each of them held a distinct title,[8] but they may now join by virtue of express statutory authorization.[9] So also while joint tenants were at one time required to join,[10] they are now permitted to sue jointly or severally.[11] A tenant in common cannot intervene, however, in an action of ejectment brought by his cotenant, since he cannot rely on the strength of the latter's title and must therefore introduce a new element into the action, namely, his own title.[12]

A tenant in common may bring an action of ejectment against his cotenant who has ousted him.[13] The plaintiff in such an action cannot, however, recover possession of the entire premises in severalty to the exclusion of the defendant, and he must prove the ouster before he can recover even his undivided part.[14] But the filing of an answer denying the plaintiff's right of possession constitutes in itself a sufficient ouster. The action is the most effective demand the plaintiff could make to be let into possession, and if his title and right of entry are denied he need make no further proof of the ouster.[15]

7. Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549. As to actions by partners generally, see PARTNERSHIP.

8. Welch v. Sullivan, 8 Cal. 165; Throckmorton v. Burr, 5 Cal. 400; De Johnson v. Sepulbeda, 5 Cal. 149.

9. Code Civ. Proc., § 384, following Stats. 1857, p. 62; Jameson v. Chanslor etc. Co., 176 Cal. 1, 167 Pac. 369; Tormey v. Pierce, 49 Cal. 306; McLeran v. Benton, 31 Cal. 29; Goller v. Fett, 30 Cal. 481; Touchard v. Keyes, 21 Cal. 202; Donner v. Palmer, 1 Cal. Unrep. 392.

10. Dewey v. Lambier, 7 Cal. 347.

11. Code Civ. Proc., § 384.

12. Donner v. Palmer, 1 Cal. Unrep. 392.

13. Lawrence v. Ballou, 37 Cal. 518; Carpentier v. Gardiner, 29 Cal. 160.

14. Ewald v. Corbett, 32 Cal. 493.

15. Plass v. Plass, 121 Cal. 131, 53 Pac. 448; Phelan v. Smith, 100 Cal. 158, 34 Pac. 667; Greer v. Tripp, 56 Cal. 209; Packard v. Johnson, 51 Cal. 545; Spect v. Gregg, 51 Cal. 198; Miller v. Myers, 46 Cal. 535; Salmon v. Wilson, 41 Cal. 595; Marshall v. Shafter, 32 Cal. 176; Payne v. Treadwell, 16 Cal. 220; Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. 985; Moore v. Moore, 4 Cal. Unrep. 190, 34 Pac.

§ 46. Vendor and Purchaser.—Where a contract for the sale of land provides that the vendor may re-enter in case of default by the vendee, the vendor may bring an action of ejectment against a defaulting vendee.[16] And even without such an agreement a vendor may bring ejectment against a vendee in possession under an executory contract of sale who has failed to comply with the terms of the contract as to the payment of the purchase price, provided there has been a demand for the payment or possession.[17] On the other hand, in a suit based upon the legal title, the defendant may set up a contract of purchase which gives him a right of entry and which has been completely executed and performed on his part.[18]

§ 47. Representatives of Decedents—Heirs or Devisees. Actions for the possession of any real property "may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."[19]

90; Freer v. Tripp, 2 Cal. Unrep. 91; Reay v. Butler, 2 Cal. Unrep. 501, 7 Pac. 669; Ketchum v. Barker, 2 Cal. Unrep. 698, 12 Pac. 251.

16. Whittier v. Stege, 61 Cal. 238; Central Pacific R. R. Co. v. Mudd, 59 Cal. 585. See VENDOR AND PURCHASER.

17. Empire Investment Co. v. Mort, 171 Cal. 336, 153 Pac. 236; Gervaise v. Brookins, 156 Cal. 103, 103 Pac. 329; Haile v. Smith, 128 Cal. 415, 60 Pac. 1032; Connolly v. Hingley, 82 Cal. 642, 23 Pac. 273; Kerns v. Dean, 77 Cal. 555, 19 Pac. 817; Hicks v. Lovell, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942; Gaven v. Hagen, 15 Cal. 208; Flint v. Conner, 35 Cal. App. Dec. 457, 200 Pac. 37; Sweet v. Richvale Land Co., 29 Cal. App. 111, 154 Pac. 608.

18. Helm v. Wilson, 76 Cal. 476, 18 Pac. 604; Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764; Walsh v. Soule, 66 Cal. 443, 6 Pac. 82; Hicks v. Lovell, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942; Central Pac. R. R. Co. v. Mudd, 59 Cal. 585; Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624; Willis v. Wozencraft, 22 Cal. 607; Travers v. Crane, 15 Cal. 12; Jacob v. Carter, 4 Cal. Unrep. 543, 36 Pac. 381. A verbal contract of sale accompanied with acts of part performance is sufficient, Weber v. Marshall, 19 Cal. 447; Arguello v. Edinger, 10 Cal. 150.

19. Code Civ. Proc., § 1582; Emeric v. Penniman, 26 Cal. 119; Teschemacher v. Thompson, 18 Cal. 11, 79 Am. Dec. 151; Curtis v. Herrick, 14 Cal. 117, 73 Am. Dec. 632. See EXECUTORS AND ADMINISTRATORS.

An executor or administrator may also bring ejectment for property acquired by the estate since the death of the decedent.[20] This action may be directed even against the heir or devisee or the grantee of either,[1] because during the administration the executor or administrator is entitled to have the exclusive possession of the property left by the deceased.[2] It is immaterial that, in a given case, there may be evidence that the property there in question will not be needed for the payment of debts or expenses of the estate. The law courts in an action of ejectment cannot try and determine whether there will be debts to be paid or expenses of administration. The consideration of these matters is exclusive within the jurisdiction of the probate court.[3] The executor or administrator is entitled to bring the action at any time until the estate is settled or until delivered over by the order of the court to the heirs or devisees.[4] But

"After the expiration of the time for the presentation of claims, he is not entitled to recover the possession of any property of the estate from any heir, who has succeeded to the property in his possession, or from any devisee, . . . to whom the property has been devised . . . or from the assignee of any such heir [or] devisee . . . unless he proves that the same is necessary for the payment of debts or legacies, or of expenses of administration already accrued or for distribution to some other heir [or] devisee . . . entitled thereto."[5]

Although formerly an heir or devisee could not maintain ejectment against a third person except when the estate was settled or the property was delivered to him

20. Salmon v. Wilson, 41 Cal. 595 (giving form of complaint and holding that it need not allege title in the decedent).

1. Page v. Tucker, 54 Cal. 121.

2. Code Civ. Proc., § 1452; Page v. Tucker, 54 Cal. 121; Webb v. Winter, 6 Cal. Unrep. 768, 65 Pac. 1028.

3. Page v. Tucker, 54 Cal. 121.

4. Code Civ. Proc., § 1452; Touchard v. Keyes, 21 Cal. 202.

5. Code Civ. Proc., § 1452. See EXECUTORS AND ADMINISTRATORS.

by order of court,[6] or when he was entitled to possession because there had been no administration,[7] it is now specifically provided that

"The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate . . . against anyone except the executor or administrator; but this section shall not be construed as requiring them so to do."[8]

6. McCrea v. Haraszthy, 51 Cal. 146; Meeks v. Kirby, 47 Cal. 168; Chapman v. Hollister, 42 Cal. 462; Hart v. Robertson, 21 Cal. 346; Meeks v. Hahn, 20 Cal. 620. See Soto v. Kroder, 19 Cal. 87, decided prior to the enactment of the statute giving the personal representative the right to possession, and holding the heir might maintain ejectment.

7. Meeks v. Kirby, 47 Cal. 168; Updegraff v. Trask, 18 Cal. 458.

8. Code Civ. Proc., § 1452; Plass v. Plass, 121 Cal. 131, 53 Pac. 448 (an heir cannot sue the administrator); Webb v. Winter, 6 Cal. Unrep. 768, 65 Pac. 1028. See McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879. As to bar of statute of limitations, see LIMITATION OF ACTIONS. See DESCENT AND DISTRIBUTION, ante, p. 446.

(T. T. M.)

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